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Fiscal Restraints Trump Due Process: Children's Diminishing Right to Counsel in Minnesota

Melissa M. Weldon*

The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant.¹

Introduction

Allison, a thirteen-year-old girl, waited in the hall of the Hennepin County Juvenile Justice Center.² She knew she had to go to court for skipping school. When she got to the courthouse, she found that the county attorney was also charging her with disorderly conduct, a misdemeanor. She did not know where this charge came from, and the petition was so vague that no one could determine the incident for which she was being charged. The county attorney, however, insisted on going forward with the proceeding. While Allison contended that she was not guilty of disorderly conduct, her mother, who did not want to take off another day of work, bullied her into pleading guilty.³ Allison felt cornered. The county

* J.D., University of Minnesota Law School, expected 1997; B.A., St. Cloud State University, 1993. I would like to thank Professors Barry Feld and Richard Frase for their thoughts on the juvenile court system, and Minnesota Chief Public Defender John Stuart for his insight into the legislative history of these statutes. I especially thank Les, my life partner, for his moral support. Finally, I dedicate this article to my son, Ryan, in the hope that he can someday live in a world where society treats people of all ages with respect, and where all people are equal in the eyes of the law.

1. *Mayer v. Chicago*, 404 U.S. 189, 197-99 (1971) (holding that the state must provide the indigent defendant with the necessary tools for an effective appellate review).

2. This hypothetical is drawn from actual cases that I have worked on in the juvenile court as a Certified Student Attorney. Due to the confidentiality of juvenile proceedings, any identifying information is excluded. While this hypothetical situation is based on my actual observations, it is a fictionalized account.

3. Child defendants do not "plead guilty," but they "admit." Different terms are used in juvenile courts and adult courts to describe the same events. For example, in juvenile court, the prosecutor files a "petition" rather than a "complaint." J. Mark Andrus, *Juvenile Court Practice*, UTAH B.J., Oct. 1995, at 33. The youth is not "convicted," but "adjudicated delinquent." Catherine R. Guttman, *Listen to the Children:*

was against her, her mother was against her, and she stood alone without any legal protection.

In 1993, the legislature amended the Minnesota statute on juveniles' right to counsel to provide that all Minnesota children, including children like Allison, would have the right to an attorney.⁴ Moreover, the 1994 legislation on the juvenile court system assured that all children had the opportunity to consult with an attorney before they could even waive this right to counsel.⁵

The 1995 Minnesota legislature stripped away this right from many children by amending several juvenile court statutes. The legislature expanded the definition of juvenile petty offender to encompass nearly all misdemeanors,⁶ changed the sentences available for these offenses,⁷ and stripped juvenile petty offenders of their right to counsel.⁸ No longer will Minnesota children charged with petty offenses—misdemeanors if committed by adults—enjoy the right to counsel.⁹ Under this new regime, a thirteen-year-old girl such as Allison stands very much alone. She faces the court without an attorney by her side. Her only sources of legal advice are the county attorney who prosecutes her and the judge who sentences her.

The Decision to Transfer Juveniles to Adult Court, 30 HARV. C.R.-C.L. L. REV. 507, 511 (1995). Both for clarity, and because often the reality of juvenile courts is the same as adult court, I use the terms applicable to adult courts to describe the events in juvenile courts throughout this article. Sometimes this is difficult to do. For example, this article deals with a group of children charged with "juvenile petty offenses." See *infra* notes 6-9 and accompanying text. This category includes mostly what would be known in the adult system as "misdemeanors." *Id.* The actions committed by the adult and the juvenile are exactly the same; the legislature merely labels them differently. As this definition is at the heart of the new legislation, the terms "juvenile petty offense" and "juvenile petty offender" will be used throughout the article.

4. MINN. STAT. § 260.155(2) (1994). "The child . . . [has] the right to assistance of counsel in connection with a proceeding in juvenile court." *Id.*

5. Under the 1994 legislative changes, before a child could waive the right to counsel "[t]he child must be fully and effectively informed of the child's right to counsel and the disadvantages of self-representation by an in-person consultation with an attorney, and counsel shall appear with the child in court and inform the court that such consultation has occurred." MINN. R. JUV. P. 4.03(1). Furthermore, if a child was charged with a gross misdemeanor or a felony, or if out-of-home placement was proposed, the court had to appoint stand-by counsel even if a child had waived the right to an attorney. MINN. STAT. § 260.155(2).

6. Act effective July 1, 1995, ch. 226, art. 3, sec. 15, § 260.195, 1995 Minn. Laws 1176.

7. Act effective July 1, 1995, ch. 226, art. 3, sec. 34, § 260.195(3), 1995 Minn. Laws 1184.

8. Act effective July 1, 1995, ch. 226, art. 3, sec. 25, § 260.155(2), 1995 Minn. Laws 1180; Act effective July 1, 1995, ch. 226, art. 3, sec. 33, § 260.195, 1995 Minn. Laws 1184.

9. See *supra* notes 6-8 (citing the new statutory provisions).

An adult defendant in the same situation can request that the court appoint an attorney for her.¹⁰ If the judge believed that, "in the interests of justice," counsel would be necessary to protect that defendant, the judge would have complete discretion to appoint an attorney.¹¹ Even without such a request, a judge in an adult criminal court can appoint counsel whenever she deems it necessary.¹² As such, an adult defendant in the same situation is granted greater protection than a child.

This article argues that these statutory amendments violate children's constitutional guarantees of due process and equal protection by unnecessarily creating a different standard for children than adults. Part I describes the context in which the legislature enacted these statutory changes, including a brief overview of the juvenile court system, an explanation of the parameters of the constitutional right to counsel, and a description of the 1995 amendments' history. Part II analyzes the constitutionality of these statutory amendments, specifically focusing on the viability of equal protection and due process challenges to the different standards these changes created. This article concludes that these statutory changes are unconstitutional. The new statutes arguably violate the Equal Protection Clause, although a challenge may fail under current children's rights jurisprudence. Under the Due Process Clause, however, the statutes fail, even under the applicable balancing test. The legislature can rectify these violations simply by modifying the statutes to guarantee parity between an adult defendant's and a child defendant's right to counsel when charged with a petty or misdemeanor-level offense.

Background

A combination of factors led to the 1995 statutory amendments to children's right to counsel. The juvenile court system was founded upon certain values and assumptions that continue to influence legal and social decisions affecting children today.¹³ Within this framework, however, certain constitutional rights remain which neither courts nor legislatures can violate, regardless of the

10. MINN. R. CRIM. P. 5.02. "Provided that for misdemeanor offenses not punishable upon conviction by incarceration, the court may appoint an attorney for a defendant financially unable to afford counsel when requested by defendant or interested counsel or when such appointment appears advisable to the court in the interests of justice to the parties." *Id.* at 5.02(2).

11. *Id.* at 5.02(2).

12. *Id.*

13. See *infra* notes 18-23 and accompanying text (discussing the values and assumptions upon which the juvenile court was built).

defendant's age.¹⁴ In addition, politics and fiscal concerns motivated the new legislation. The 1995 amendments were the result of these historical, legal, and political factors.

A. A Segregated System of "Justice"

While American legal systems have always treated younger people differently,¹⁵ there has not always been an entirely separate court system for children. The segregated system evolved much later in American history. Since its creation, this segregated system has often been challenged, only sometimes successfully.¹⁶ The philosophy behind the creation of the juvenile courts in the late nineteenth century remains today and continues to affect the success of challenges to differences between the systems.

1. The Creation of the Juvenile Court

A separate court system for children arose from the Progressive ideals of the late nineteenth century.¹⁷ The Progressive reformers founded the juvenile court system on the belief that children were different from adults, and thus in need of an entirely separate court system.¹⁸

14. See *infra* notes 41-43 and accompanying text (listing fundamental procedural rights granted to children).

15. See, e.g., ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 101 (1969) (noting that, "Nineteenth-century legal doctrines and sentencing policies made allowances for the immaturity and disabilities of children."). But see PAUL R. KFOURY, *CHILDREN BEFORE THE COURT: REFLECTIONS ON LEGAL ISSUES AFFECTING MINORS* 37 (2d ed. 1991) (stating that children had the same rights and received the same punishments as adults prior to the creation of juvenile courts).

16. See *infra* notes 24, 36-45 and accompanying text (describing various court challenges).

17. The Progressive Era was a time in America's history when a great deal of broad-sweeping social reforms were enacted. The concepts of indeterminate sentencing, probation, parole, and many other reforms in the areas of child labor, education, and social welfare in general emerged from this era. DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 3 (1980). There are many other resources available on the history of this era. See generally JAMES LEIBY, *A HISTORY OF SOCIAL WELFARE AND SOCIAL WORK IN THE UNITED STATES* 136-62 (1978) (giving a brief history of the Progressive Era); SUSAN TIFFIN, *IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA* (1982) (chronicling the child welfare movement of this era).

18. The idea of childhood was changing during this time period. ROTHMAN, *supra* note 17, at 207-12. Society began to see childhood as a time of innocence and vulnerability, and, therefore, the reformers believed that children needed adult protection and wisdom. *Id.*

For children who deviated from these ideals, the juvenile court system served as a guiding force, putting children back on the right path. Unlike the adult system, which served largely as a punitive institution, the juvenile system purported to help rehabilitate youth. *Id.* at 213. For a detailed accounting of the origins of the juvenile court, see KFOURY, *supra* note 15, at 37-41; PLATT, *supra* note 15.

To these reformers, the ideal system custom-made for children revolved around individualized treatment and informal processing.¹⁹ The judge was to treat each child as an individual with a unique case, focusing on that specific child rather than the specific offense allegedly committed.²⁰ Informality was important because

The separate legal status created for children has often been disabling. See, e.g., MINN. STAT. § 336.3-305(a)(1)(i) (1994) (precluding children from making contracts); MINN. STAT. § 517.02 (1994) (prohibiting children from marrying). Even if children live in abusive homes, they do not have the right to move out and live on their own without a parent's consent. See MINN. STAT. § 260.015(20) (1994) (defining such actions as a punishable offense). While many portray these measures as protective, they are more often disabling. Consider the child's right to confidentiality in juvenile court proceedings. While intended to protect the child from public stigmatization, the closed-door policy of the juvenile court may actually serve to hide the court's arbitrary and discriminatory enforcement of the laws. M.A. BORTNER, *INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE* 15 (1982).

19. See *infra* notes 20-22 and accompanying text (describing these components of juvenile court).

20. The judge was to "treat" the child based on that child's entire social history, including socio-economic status, family circumstances, and past misbehavior. ROTHMAN, *supra* note 17, at 215-16. The court was to view each child separately, and sentencing was to be indeterminate, based solely on the individual child's needs and the progress that child would make in the "treatment" program. BORTNER, *supra* note 18, at 1-14. The focus was on what the judge perceived the child needed, not on the child's guilt or innocence. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909) (stating that, "The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.").

Because the Progressives placed their faith in this process, they invested the juvenile court judges and social workers with an enormous amount of discretion, believing that the courts needed such broad discretion to achieve true "rehabilitation." ROTHMAN, *supra* note 17, at 212. Unfortunately, courts often use this discretion as a tool of discrimination:

The evidence clearly indicates that rather than viewing each child as an individual, the juvenile court often operates in such a manner that children are perceived and processed according to stereotypes. Individualized justice abdicates to assembly-line justice; the child is black or poor or female, not an individual. Visions of the unstable black family, the inadequate lower-class environment, or the troublesome female runaway supercede the needs of juveniles.

BORTNER, *supra* note 18, at 250.

Discrimination against youth of color continues to pervade the juvenile court system. In 1993, the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System found that while "people of color comprise 8% of the state's juvenile population, 22% of juveniles processed as delinquent are people of color." MINNESOTA SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYSTEM, FINAL REPORT S-25 (1993) [hereinafter RACIAL BIAS TASK FORCE]. The study further showed that "race is a significant, independent variable that influences decisions on both pretrial detention and out-of-home placement" in the juvenile courts. *Id.* at 99. This problem is at least partly due to the fact that there are "no objective written detention criteria to guide anyone in the detention process." *Id.* at 102. Written criteria are inconsistent, however, with the individualized approach.

The individualized approach has also resulted in gender discrimination, especially where status offenses are concerned. Ira M. Schwartz et al., *Federal Juvenile Justice Policy and the Incarceration of Girls*, 36 CRIME & DELINQ. 503, 513 (1990).

only in an informal court would the judge be free to interrogate the child without the obstructions of defense counsel or procedural rules.²¹ For years, the juvenile courts remained an individualized, informal system, denying any procedural rights to children.²² Over time, the assumption has continued that children are less capable and less competent than adults, and therefore require different treatment.²³

2. Challenges to this Segregated System

Several challenges to the informal juvenile court system have succeeded in guaranteeing children many of the procedural rights already granted to adults. Children have brought these challenges under both the Due Process and the Equal Protection Clauses, and often the courts combined the two clauses in their analyses.²⁴ When children's procedural rights are at issue, the court must ask not only whether children are receiving the procedural protections to which they are constitutionally entitled, but also whether granting children fewer rights than adults violates children's right to equal protection under the laws.

For example, in 1987, 18% of females in public detention centers were status offenders, while only 3% of boys were. *Id.* See also BORTNER, *supra* note 18, at 32 (observing that females are more often incarcerated for status offenses); Cheryl Dalby, *Gender Bias Toward Status Offenders: A Paternalistic Agenda Carried Out Through the JJDP*, 12 LAW & INEQ. J. 429, 445-46 (1994) (noting that girls have a greater chance than boys of having a petition filed against them because of a status offense).

21. According to the Progressive reformers' rationale, only in an informal court could a judge discern the real needs of the child. ROTHMAN, *supra* note 17, at 216-17. See also Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 CRIM. L. & CRIMINOLOGY 1185, 1192 (1988) [hereinafter *Right to Counsel*] (finding that, "Juvenile court judges regarded lawyers as both irrelevant and an impediment to their 'childsaving' mission.").

22. Some scholars have portrayed the separate system of justice as a benign and humanitarian institution. BORTNER, *supra* note 18, at 3. In fact, this is the "image that has dominated within American society, an image that presently is being challenged severely." *Id.*

23. See, e.g., Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1120 (1991) ("[J]uvenile court professionals all too frequently assume that juvenile accuseds are incapable of exercising sound judgment in making the decisions that affect their cases."); Donald J. Harris, *Due Process v. Helping Kids in Trouble: Implementing the Right to Appeal from Adjudication to Delinquency in Pennsylvania*, 98 DICK. L. REV. 209, 226 (1993) ("Many attorneys feel that adolescents, particularly delinquent adolescents, have not reached the age of discretion and therefore lack the capacity to intelligently discern their own best interests.").

24. See, e.g., *In re Brown*, 439 F.2d 47, 52 (2d Cir. 1971). This case recognized the necessity of using both clauses in an analysis of children's procedural rights: "While these cases were decided under the due process clause of the Fourteenth Amendment, there is no reason for withholding similar application of the equal protection clause in appropriate aspects of juvenile court proceedings." *Id.*

The United States Supreme Court has based its equal protection analysis on varying levels of scrutiny.²⁵ Therefore, one must first ask which level of scrutiny such a challenge will receive. If a fundamental right or a suspect class is involved,²⁶ the court will subject the legislation at issue to strict scrutiny,²⁷ requiring that the legislation be narrowly tailored to a compelling state goal.²⁸ If there is no fundamental right or suspect class, the Court will subject the legislation only to rational basis review, examining whether the legislation is rationally related to permissible state goals.²⁹

25. See, e.g., *Craig v. Boren*, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring) (recognizing at least three levels of equal protection review). For criticism of using varying levels of equal protection review, see *id.* at 211-12 (Stevens, J., concurring) (contending that "[t]here is only one equal protection clause"). For an explanation of the various levels of equal protection review, see Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121 (1989).

26. The Court has defined suspect classes as those groups that are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). In addition, the group must be "discrete and insular." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), and the defining characteristic should be "determined solely by the accident of birth," bearing "no relation to ability to perform or contribute to society," *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (plurality opinion).

Certain classes are not suspect enough to receive strict scrutiny, but may be semi-suspect enough to receive an intermediate level of scrutiny. See, e.g., *Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (illegitimacy); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (gender). This level of scrutiny requires that the state goal be important and that the means used to achieve it are substantially related to that goal. *Craig*, 429 U.S. at 197 (enunciating this test).

The status of a given class is not necessarily stable. For example, a plurality of the Court at one time subjected gender classifications to strict scrutiny. See *Frontiero*, 411 U.S. at 688. Gender classifications now receive only intermediate scrutiny. *Craig*, 429 U.S. at 197. The current Clinton administration is pushing for the courts to enhance this scrutiny, making gender a fully suspect class. *'96 Rulings May Equate Gender Bias with Racial Bias—But at What Cost?*, STAR TRIB. (Minneapolis), Jan. 2, 1996, at A7.

For a general explanation of the suspect class analysis, see Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 938-39 (1991).

27. See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam) (finding that strict scrutiny did not apply because neither a fundamental right nor a suspect class was at issue); *Shapiro v. Thompson*, 394 U.S. 618, 538 (1969) (finding the right to interstate travel fundamental and applying strict scrutiny review).

28. See, e.g., *Miller v. Johnson*, 115 S. Ct. 2475, 2482 (1995) (stating that race-based classifications are subject to this test); *Shapiro*, 394 U.S. at 638 (concluding that the legislation affecting a fundamental right failed because there was no "compelling state interest").

29. See, e.g., *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (finding that state laws are presumptively valid); *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 172 (1972) (stating that this test establishes the minimum requirement legislation must meet).

Minnesota courts apply a unique standard of review to equal protection challenges. While Minnesota courts have consistently analyzed equal protection challenges made by children under rational basis review,³⁰ this rational basis test is much stricter than the federal standard.³¹ When federal courts apply rational basis, they will uphold legislation as long as there is any imaginable rationale for the classification.³² Minnesota courts, however, do not hypothesize rationales for the legislature.³³ Rather, the legislature must provide an actual justification for any differential treatment.³⁴

While both federal and Minnesota state courts have declared that various procedural rights are fundamental for children, they

30. See, e.g., *In re K.A.A.*, 410 N.W.2d 836, 841 (Minn. 1987) (using rational basis to deny a child the right to waive juvenile court jurisdiction). Minnesota courts use rational basis in these cases because they have concluded that age is not a suspect class. *Id.* See also *infra* note 35 and accompanying text (explaining that federal courts have also concluded that children are not a suspect class).

31. *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991). More recent cases have hinted that the courts may retreat from this heightened scrutiny. For example, when a Minnesota court does not want to apply the stricter test, it simply cites to pre-*Russell* decisions that used the more deferential standard. See, e.g., *Skeen v. State*, 505 N.W.2d 299, 316 (Minn. 1993) (citing *In re Harhut*, 385 N.W.2d 305, 310 (Minn. 1986)).

Despite this, *Russell* has not been overruled and continues to be cited for the heightened rational basis test in Minnesota cases. See, e.g., *In re L.J.S. & J.T.K.*, 539 N.W.2d 408, 412 (Minn. Ct. App. 1995) (upholding presumptive certification for certain juvenile offenses); *State v. Jaworsky*, 505 N.W.2d 638, 644 (Minn. Ct. App. 1993) (finding that Minnesota's sentencing guidelines do not offend the Equal Protection Clause of the Minnesota Constitution); *Mitchell v. Steffen*, 487 N.W.2d 896, 904 (Minn. Ct. App.) (striking down lower welfare benefits for new Minnesota residents), *aff'd*, 504 N.W.2d 198 (Minn. 1992).

32. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) ("[I]f any state of facts reasonably can be conceived that would sustain . . . [the classification], the existence of that state of facts at the time the law was enacted must be assumed.").

33. "[I]n the cases where we have applied . . . the Minnesota rational basis analysis, we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires." *Russell*, 477 N.W.2d at 889. This case involved a drug sentencing scheme that treated crack cocaine users more harshly than powder cocaine users. *Id.* at 887. Defendants charged under these statutes challenged the scheme as having a disparate impact on African-Americans, arguing that crack cocaine was used predominantly by blacks and powder cocaine was used predominantly by whites. *Id.* Although the state argued that the legislation should pass the federal rational basis test, the court concluded that the legislation had to be evaluated under Minnesota law. *Id.* at 888. Accordingly, the court applied the stricter Minnesota rational basis test and refused to guess at the legislature's rationale. *Id.* at 889.

34. "Instead, we have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals." *Id.* The court would not rely on the "purely anecdotal testimony" offered by the state to support the distinction. *Id.*

have consistently held that age is not a suspect class.³⁵ Therefore, most equal protection challenges brought by children are subject to rational basis review. Even under this test, however, the cases make no clear determination of when children can constitutionally be treated differently than adults.

These cases can be divided into two broad categories: those where a child challenges the sentence given because it is harsher than an adult would receive, and those where a child challenges the procedure employed during her trial. In the sentencing cases, courts use rational basis review, consistently upholding the disparate sentences.³⁶

When procedure is at issue, however, courts consider the Due Process Clause as well as the equal protection issues, and the ultimate test is one of "fundamental fairness" to a child defendant.³⁷ Here, courts balance the right asserted by a child against the effect

35. See, e.g., *Dallas v. Stanglin*, 490 U.S. 19, 26-28 (1989) (stating that a differing age standard for entrance to a dance hall did not involve a suspect classification and that rational basis was the appropriate test). Courts have concluded that youth is not a suspect class because eventually, everyone "grows out" of it: "such requirements do not result in an absolute prohibition but merely postpone the opportunity to engage in the conduct at issue." *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990) (upholding the constitutionality of a minimum age requirement for holding public office).

36. When children are tried in the juvenile court system, they may receive a much longer sentence than an adult would receive for the same offense. See, e.g., *In re Gault*, 387 U.S. 1, 29 (1967) (finding that while an adult could receive at a maximum two months jail time or a fifty dollar fine for the same offense, a child could be institutionalized for six years). While many children have argued that such sentencing structures violate their right to equal protection under the laws, courts have consistently upheld the disparate sentencing structures. See, e.g., *United States v. Donelson*, 695 F.2d 583, 588 (D.C. Cir. 1982) (upholding the sentencing disparity of the Youth Corrections Act); *Backdahl v. Commissioner of Pub. Safety*, 479 N.W.2d 89, 92 (Minn. Ct. App. 1992) (upholding longer driver's license suspension for children under Minnesota's Equal Protection Clause).

The essential rationale is always the same: children are receiving treatment, not punishment, and treatment takes time. See, e.g., *Donelson*, 695 F.2d at 588 (upholding the sentencing disparity of the Youth Corrections Act because of the Act's rehabilitative, rather than punitive, nature); *Carter v. United States*, 306 F.2d 283, 285 (D.C. Cir. 1962) (holding that longer sentences do not violate equal protection "because such confinement cannot be equated with incarceration in an ordinary prison") (citing *Cunningham v. United States*, 256 F.2d 467 (5th Cir. 1958)).

Although infrequent, children have had some success challenging disparate sentencing standards. If a child can prove that the "treatment" being given to her or him is no different than the punishment being given to an adult charged with the same offense, the courts may invalidate the longer sentence. See, e.g., *United States v. Preiser*, 506 F.2d 1115 (2d Cir. 1974). The court in *Preiser* struck down a statutory sentencing scheme that allowed youths to be sentenced longer than adults for the same crimes because youths did not receive any special rehabilitative treatment, thereby eliminating any distinction between juvenile training schools and adult prisons. *Id.* at 1118-20.

37. *McKiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

such a right will have on the juvenile court system as a separate entity.³⁸ If the right is fundamental, even a substantial effect on the juvenile court system will be irrelevant.³⁹ If, however, the court finds that the right is not fundamental, it will closely scrutinize the effect such a right will have on the informal proceedings of the juvenile courts.⁴⁰

Because of this balancing test, there is no clear indicator of what specific rights will be granted to children. For example, courts have found that the right to appeal,⁴¹ the right to have guilt proven beyond a reasonable doubt,⁴² and the right to counsel⁴³ are all fundamental rights which must be granted to children irrespective of the effect such rights may have on the juvenile courts. Conversely, courts have extended to children neither the right to bail⁴⁴ nor the right to a jury trial⁴⁵ based on the rationale that other protective measures are already in place, and that the negative systemic effects of granting such rights outweigh any benefits that may accrue to the child.⁴⁶

The 1995 amendments must be analyzed in light of these historical and legal considerations. Both equal protection and due process rights must be protected in any statutory scheme that affects children's right to counsel. In determining what level of scrutiny these amendments should receive, the right at issue must first be classified.

38. This test was first clearly enunciated in *McKeiver*, *id.* at 545, although a similar analysis had been used previously to determine the rights of juveniles. See, e.g., *In re Winship*, 397 U.S. 358, 366-67 (1970) (upholding the "beyond a reasonable doubt" standard as applied to juveniles since it would produce "no effect on the proceedings distinctive to juvenile proceedings").

39. See, e.g., *In re Brown*, 439 F.2d 47, 52-53 (3d Cir. 1971) (granting juveniles the right to appeal without first obtaining a special allowance from the court because there is an absolute right of appeal); see also *infra* notes 42-43 and accompanying text (citing other cases finding certain rights fundamental for children in juvenile proceedings).

40. See, e.g., *McKeiver*, 403 U.S. at 545 (concluding that "the jury trial . . . will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding").

41. *Brown*, 439 F.2d at 52.

42. *Winship*, 397 U.S. at 368.

43. *In re Gault*, 387 U.S. 1, 41 (1967). This is not an absolute right to counsel in all cases. The right to counsel granted to both children and adults contains many limitations. See *infra* notes 49-53 and accompanying text (describing the limits of the right to counsel).

44. *L.O.W. v. District Ct. of Arapahoe County*, 623 P.2d 1253, 1255 (Colo. 1981) (en banc).

45. *McKeiver*, 403 U.S. at 545.

46. See, e.g., *id.* at 543 (concluding that a judge could serve as fact-finder and a jury would be too disruptive to the juvenile court).

B. *The Constitutional Right to Counsel*

The appropriate standard of review for analyzing these statutory changes depends at least in part on the right at issue.⁴⁷ The Sixth Amendment of the United States Constitution guarantees a criminal defendant the "Assistance of Counsel for his defence."⁴⁸ The United States Supreme Court has interpreted this clause over time and has clarified those instances in which counsel must be provided both for adults and for children.

Under the federal standard, adult criminal defendants must be represented by an attorney in any case where they are ultimately sentenced to imprisonment.⁴⁹ As the Supreme Court held in *Scott v. Illinois*,⁵⁰ even if a statute authorizes incarceration, the judge can refuse to appoint an attorney based on the belief that incarceration will not occur in that particular case.⁵¹ In quasi-criminal proceedings, such as probation hearings or civil commitments, the Supreme Court has authorized a more flexible due process stan-

47. See *supra* notes 26-29, 39-40 and accompanying text (explaining this preliminary step in both generic equal protection analysis and when children's due process rights are at issue).

48. U.S. CONST. amend. VI.

49. In the landmark case, *Gideon v. Wainwright*, 373 U.S. 335, 342 (1963), the Court found that the Sixth Amendment right to counsel was a fundamental right applicable to the states through the Fourteenth Amendment. *Gideon* dealt specifically with a felony charge. *Id.* at 336-37. In *Argersinger v. Hamlin*, 407 U.S. 25, 25 (1972), the Court held that even in a misdemeanor case, a defendant could not be imprisoned without having had the advice of counsel at trial.

50. 440 U.S. 367 (1979).

51. *Id.* at 369 (citing *Argersinger*, 407 U.S. at 37, 40). The court can impose fines, probation, community service, or other non-incarcerative sentences without an attorney representing the defendant. *Id.* There are numerous problems with this case and its rationale. Most significantly, it requires the judge to decide the sentencing outcomes of the case before the evidence is presented. *Id.* at 374 (Powell, J., concurring). For further criticism of this opinion, see Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 54-56 (1991); Joseph N. Froehlich, *Nichols v. United States: Defining the Proper Role of Valid Uncounseled Misdemeanor Convictions in Subsequent Sentencing Enhancement*, 73 N.C. L. REV. 1737, 1755-60 (1995).

In addition, courts can enhance penalties based on earlier convictions, despite lack of counsel, as long as the earlier conviction was constitutional. *Nichols v. United States*, 114 S. Ct. 1921, 1928 (1994). This case substantially changed right to counsel jurisprudence, overturning an earlier decision, *Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam). For a criticism of this change, see, e.g., Christine S. May, Casenotes and Comments, *Uncounseled Misdemeanor Convictions and Their Unreliability for Sentence Enhancement Under the United States Federal Sentencing Guidelines: Nichols v. United States*, 18 HAMLINE L. REV. 231 (1994) (concluding that *Nichols* was wrongly decided based on right to counsel precedent and the unreliability of misdemeanor convictions).

dard,⁵² whereby the judge is to determine the defendant's right to counsel on a case-by-case basis.⁵³

In Minnesota, an adult's right to counsel is even more extensive. An adult defendant must be represented by counsel in any case where that defendant is charged with an offense where the statute authorizes incarceration.⁵⁴ In addition, Minnesota judges have the discretion to appoint counsel for adults in any criminal case where it is believed to be appropriate or necessary.⁵⁵

In 1967, the United States Supreme Court extended the right to counsel to child defendants.⁵⁶ The Supreme Court continues to uphold the child's right to counsel, and continually emphasizes the important role an attorney plays in juvenile proceedings.⁵⁷

C. Children's Right to Counsel in Minnesota

In the past, Minnesota complied with these constitutional mandates in theory, while in practice children's right to counsel was not always protected. Studies showed that the courts were not even providing legally mandated counsel.⁵⁸ In 1989, the Minnesota Supreme Court responded by creating the Juvenile Representation

52. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974) (concluding that due process requires flexibility); *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973) (stating that the need for an attorney arises from the intricacies of each specific case).

53. *Gagnon*, 411 U.S. at 790. *Gagnon* was the first case to enunciate this standard for right to counsel in the non-criminal proceeding. It determined that counsel was not necessary in all probation hearings, because they were not technically a "stage of a criminal prosecution." *Id.* at 782. In finding that counsel may be required in certain instances, the Court emphasized that, in this case, there was still the possibility of the defendant's loss of liberty. *Id.* This was the same line drawn in *Scott*, 440 U.S. at 369.

54. MINN. R. CRIM. P. 5.02. This rule codified an earlier Minnesota decision holding that counsel should be provided in any case where incarceration is statutorily authorized. *State v. Borst*, 154 N.W.2d 888, 894-95 (1967).

55. See *supra* notes 10-12 and accompanying text (describing this judicial discretion).

56. *In re Gault*, 387 U.S. 1, 41 (1967). In this case, the Court also limited a minor's right to counsel to cases where there was the possibility of commitment to an institution. *Id.*

57. See, e.g., *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) ("[T]he lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts.").

58. There are several studies on the lack of counsel in juvenile courts. For Minnesota specifically, see JUVENILE REPRESENTATION STUDY COMMITTEE TO THE MINNESOTA SUPREME COURT, REPORT 11 (1990) [hereinafter JUVENILE REPRESENTATION]; *Right to Counsel*, *supra* note 21, at 1185; Barry C. Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393 (1988).

Lack of counsel continues to be a problem in the juvenile court. A recent American Bar Association study concluded that "juvenile court defendants often appear with no lawyer at their side." ABA Study: *Kids in Trouble are Lacking Legal Help*, STAR TRIB. (Minneapolis), Jan. 1, 1996, at A4.

Study Committee to study whether children received counsel, and, if not, why not.⁵⁹

The Committee found that most children were going through the system without legal representation.⁶⁰ Even worse, nearly one-third of Minnesota children placed outside their homes and more than one-fourth of Minnesota children incarcerated were not represented by an attorney during their trials.⁶¹ This was in direct conflict with the constitutional mandate requiring the court to appoint counsel any time incarceration was imposed.⁶² The Committee also found the most common explanation for lack of representation was that children waived their right to an attorney,⁶³ as encouraged by judges.⁶⁴

In response to these findings, the Minnesota legislature formed the Supreme Court Advisory Task Force on the Juvenile Justice System to study these issues further.⁶⁵ The Task Force concluded that the law should guarantee children the right to actual legal representation in *all* juvenile court proceedings.⁶⁶ In response to the invalid waiver problem, they recommended that a child be advised of her rights before she was allowed to waive counsel.⁶⁷ The 1994 Minnesota legislature adopted the recommendations of the Task Force,⁶⁸ and enacted a number of statutes giving

59. JUVENILE REPRESENTATION, *supra* note 58, at 4; Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 993 (1995) [hereinafter *Public Policy*].

60. The Committee found that less than half of all Minnesota children adjudicated delinquent had been represented by counsel, and an even greater percentage of children charged with less serious offenses were being tried without counsel. JUVENILE REPRESENTATION, *supra* note 58, at 11.

61. *Id.* at 16. Furthermore, the actual presence of a defense attorney in juvenile court varied greatly across the state. While in 1988, 48% of children convicted had been represented by an attorney, the variation of representation across the state ranged from 100% in one county to under 5% in another county. *Id.* at 11.

62. See *supra* notes 47-52 and accompanying text (describing the federal constitutional mandates for appointment of counsel). Furthermore, under Minnesota law, an attorney should be present any time incarceration is statutorily authorized. See *supra* notes 10-12, 54 (explaining Minnesota's more extensive right to counsel).

63. JUVENILE REPRESENTATION, *supra* note 58, at 13.

64. *Public Policy*, *supra* note 59, at 1109. See also *supra* note 21 and accompanying text (describing the perceived importance of informality in the juvenile court).

65. MINNESOTA SUPREME COURT ADVISORY TASK FORCE ON THE JUVENILE JUSTICE SYSTEM, FINAL REPORT 1 (1994) [hereinafter *TASK FORCE*].

66. *Id.* at 48-49. In these recommendations, the Task Force specifically addressed the issue of children charged with misdemeanors: "the Task Force recommends that for juveniles charged with misdemeanors, in person consultation with a defense attorney be mandatory prior to the juvenile being permitted to waive the right to legal representation or to enter a plea to the petition." *Id.* at 49.

67. *Id.* at 49. These recommendations were codified in MINN. STAT. § 260.155(2) and MINN. R. JUV. PROC. 4.03(1).

68. *Public Policy*, *supra* note 59, at 987.

Minnesota children an extensive right to counsel any time they appeared before the court.⁶⁹ Under this new legislation, Minnesota children enjoyed the right to counsel in connection with *any* juvenile court proceeding.⁷⁰ Children charged with misdemeanors had to consult with an attorney before they could waive their right to counsel.⁷¹ During this meeting, counsel had to provide a "full and intelligible explanation of the child's rights."⁷² In any case where the court felt counsel was necessary or appropriate, the judge had discretion to appoint counsel, even if the child had waived that right.⁷³ Further, if the court concluded that the child could not afford counsel, the court would appoint counsel at public expense.⁷⁴ Thus, these statutes created an even broader statutory right than the Constitution mandates.⁷⁵

Governor Arne Carlson applauded these new laws, largely because, in addition to granting children more procedural rights, the new laws "got tough" on juvenile crime.⁷⁶ After signing these new provisions into law, however, Governor Carlson vetoed all additional provisions providing the funding needed in order for the public defender offices to represent these children.⁷⁷ These new laws

69. See, e.g., MINN. STAT. § 260.155(2) (codifying the 1994 right to counsel for children).

70. *Id.* "The child, parent, guardian or custodian have the right to effective assistance of counsel in connection with a proceeding in juvenile court." *Id.*

71. *Id.* "Before a child who is charged by delinquency petition with a misdemeanor offense waives the right to counsel or enters a plea, the child shall consult in person with counsel . . ." *Id.* If the child is charged with a more serious offense, or out-of-home placement is proposed, the court must appoint counsel or stand-by counsel if the child waives the right to an attorney. *Id.*

72. *Id.*

73. MINN. STAT. § 260.155(2)(b). "If they desire counsel but are unable to employ it, the court shall appoint counsel to represent the child or the parents or guardian in any other case in which it feels that such an appointment is desirable." *Id.*

74. MINN. R. JUV. P. 4.02, 4.06.

75. The Constitution, as interpreted by the Supreme Court, only requires that the right to an attorney exist when actual incarceration is imposed. See *supra* notes 49-51 (explaining the constitutional right to counsel).

76. "Carlson assented to the bill's provisions to heighten accountability and stiffen penalties for young lawbreakers." *Crime Fight: Pinching Pennies, Scrimping on Justice*, STAR TRIB. (Minneapolis), May 16, 1994, at A12.

77. "Carlson used his line-item veto authority to snuff \$4.6 million in a \$13.5 million juvenile justice bill. The money would have gone for public defenders, probation officers and four new judges." Robert Whereatt & Dennis J. McGrath, *Legislators Push to Wrap Up Key Bills: Carlson Vetoes Funds for Education, Crime*, STAR TRIB. (Minneapolis), May 6, 1994, at B1, B5.

When legislators write the "tough on crime" mantra into law, the result is often lopsided funding with any additional money going to police and prisons rather than to attorneys and courts. Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic: Balanced Allocation of Resources is Needed to End the Constitutional Crisis*, CRIM. JUST., Summer 1994, at 13. Such measures "indicate a failure to look at the criminal justice system as an 'ecosystem' wherein all the elements—law enforcement, prosecution, defense, the courts, and corrections—are in-

mandating representation took effect on January 1, 1995, without the funding necessary to make them a reality.⁷⁸ The Carlson veto left the public defenders in a bind. They now had the statutory duty to represent substantially more children, but no more money with which to do so.⁷⁹ In the next legislative session, the Minnesota legislature would have to deal with this discrepancy.

D. The 1995 Amendments

1. The Legislative History

In the spring of 1995, the Minnesota legislature grappled with the issue of whether it could continue to guarantee children full procedural rights without any of the funding needed to deliver the statutorily required services. The "solution" came in a late night meeting between Representative Dave Bishop, a member of the House Committee on Judiciary Finance, and Minnesota Chief Public Defender John Stuart.⁸⁰ At this meeting, Bishop proposed doing

extricably woven together." *Id.* at 53. Minnesota has incredibly lopsided funding in its justice system. In 1991, \$798,000 was spent on law enforcement and corrections, but only \$271,700 was spent on the courts. DANIEL STORKAMP, CRIMINAL JUSTICE CENTER, *JUSTICE TRENDS AND PROJECTIONS IN MINNESOTA* 8 (1995). See also Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 802-13 (1995) (describing the funding disparity between prosecutors and public defenders).

78. See, e.g., MINN. STAT. ANN. § 260.155(2) (West 1992 & Supp. 1995) (effective Jan. 1, 1995).

79. The new laws placed this burden on an already overburdened public defender system. According to state board caseload standards, while the Hennepin County Public Defender's office should have at least 157 attorneys, they currently have only 86. Randy Furst, *Public Defender Statute Ruled Unconstitutional, State Funding Arbitrarily Limits Legal Assistance to the Needy*, STAR TRIB. (Minneapolis), Apr. 27, 1995, at B1. Because of this, the Hennepin County Chief Public Defender, Bill Kennedy, sued the state because he was unable to effectively provide legal assistance to his clients. *Id.* The lower court found the funding statute to be unconstitutional, and the state appealed. *Id.* In February of 1996, the Minnesota Supreme Court reversed the lower court, concluding that Kennedy did not have standing to sue because he had not shown a sufficient "injury in fact to himself or his clients." Kennedy v. Carlson, Nos. C0-95-1282, C6-95-1559, 1996 WL 65766, at *7 (Minn. Feb. 16, 1996).

Similar problems exist throughout the country. In Atlanta, Georgia, public defender Lynne Borsuk filed a motion asking the court not to appoint her to any more cases. Patrick Noaker, *It Doesn't Come With the Territory: Public Defenders Must Decline to Violate Legal and Ethical Standards in the Face of Rising Caseloads*, CRIM. JUST., Summer 1995, at 18. In retaliation, her supervisor "ultimately removed Borsuk from the division in which she filed the motion and placed her in juvenile court as punishment." *Id.* (emphasis added). Juvenile court assignments are often seen as a punishment for attorneys. Many public defender offices place their most inexperienced and incapable attorneys in the juvenile division. *Right to Counsel*, *supra* note 21, at 1331.

80. Interview with John Stuart, Minnesota State Chief Public Defender, in Minneapolis, Minn. (Sept. 8, 1995).

something to reduce the public defender caseloads in light of the Carlson veto.⁸¹ Eventually, the two reached an agreement.

The legislature first discussed the terms of this agreement on April 19, 1995, during a meeting of the House Committee on Judiciary Finance.⁸² Bishop began by explaining the proposed statutory changes which would expand the scope of juvenile petty offenses and in turn deny children counsel for those offenses.⁸³ Stuart was there to support Bishop and further explain the effect of these statutory changes.⁸⁴ There were two main objections to the proposal.

First, Representative William Macklin expressed concern about including such a substantial policy change in a judiciary finance bill that would go through with little legislative attention or discussion.⁸⁵ While acknowledging that this represented a substantial change, Bishop asserted that such a change would actually incite discussion of juvenile court issues.⁸⁶

The next objection dealt with the decriminalizing effect of these statutory changes. Along with taking away the right to counsel, the proposed changes provided that juvenile petty offenders could no longer be placed outside the home for such offenses.⁸⁷ One representative expressed concern about the public perception that the courts were too lenient and that such measures would add to that perception.⁸⁸

Throughout this discussion, a near consensus existed that the main reason for such a change was fiscal. Bishop acknowledged that the changes were being proposed for a "pecuniary goal."⁸⁹ Others expressed a desire for a more extensive right for children, if only funding were available. Macklin said that if the state could afford it, all children should see an attorney before going to court.⁹⁰ Stuart said that the public defender offices would be glad to provide

81. *Id.*

82. *31st Meeting of the House Comm. on Judiciary Fin.*, 79th Minn. Sess. (Apr. 19, 1995) [hereinafter *Judiciary Fin. Meeting*] (available on tape at the Minnesota Legislative Library, Tape 3).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* To some extent, he may have been right. A month after the statutory changes were enacted, there was a court challenge to the denial of counsel for juvenile petty offenders. See *infra* part I.D.3 (describing this challenge). It is unknown, though, whether any real discussion of the issue has gone on among the general public or even among the legal community.

87. Act effective July 1, 1995, ch. 226, art. 3, sec. 34, § 260.195(3), 1995 Minn. Laws 1184.

88. *Judiciary Fin. Meeting*, *supra* note 82.

89. *Id.*

90. *Id.*

service to all children, but that such a task was impossible given the small budget available to them.⁹¹

After this discussion, there was one more request to take the proposed changes off the agenda until the entire Judiciary Committee could discuss the issue.⁹² The committee chair, Representative Murphy, explained that there had been other proposals included in the bill that had not been agreed on unanimously.⁹³ In response, Bishop asked that these provisions remain in the omnibus judiciary finance bill, and the committee voted.⁹⁴ Although the vote was not unanimous, a majority of the committee members accepted the proposed changes.⁹⁵

The Senate did not fully address this portion of the bill until the entire judiciary finance bill reached the Conference Committee.⁹⁶ There was only minor discussion over a few word changes, but the provision denying the right to counsel for juvenile petty offenders remained.⁹⁷ This resulted in the current state of the law, reclassifying child misdemeanants as petty offenders and stripping away their right to counsel.

2. The Amendments

The first step in the new legislation was to expand the category of juvenile petty offenses. While this category originally included status offenses, alcohol offenses, and controlled substance offenses,⁹⁸ the legislature expanded the class to include almost all misdemeanors,⁹⁹ with exceptions for more serious misdemean-

91. *Id.* John Stuart reiterated this position during an interview. Interview with John Stuart, *supra* note 80. Stuart was obviously torn on this issue, but due to the fiscal bind that the Carlson veto placed him in, he had very few other options.

92. *Judiciary Fin. Meeting*, *supra* note 82.

93. *Id.*

94. *Id.*

95. *Id.* There is no record of how many people did vote for passage of these provisions. The tapes of the committee meetings, though, make clear that a majority of the members did vote for the new statutes. *Id.*

96. Telephone Interview with John Curry, Administrator of the House Committee on Judiciary Finance (Nov. 17, 1995).

97. *Id.*

98. MINN. STAT. § 260.015(21) (1994).

99. Act effective July 1, 1995, ch. 226, art. 3, sec. 15, § 260.015(21)(b), 1995 Minn. Laws 1176.

"Juvenile petty offense" also includes an offense, other than a violation of section 609.224, 609.324, 609.563, 609.576, or 617.23, that would be a misdemeanor if committed by an adult if:

- (1) the child has not been found to be a juvenile petty offender on more than two prior occasions for a misdemeanor-level offense;
- (2) the child has not previously been found to be delinquent for a misdemeanor, gross misdemeanor, or felony offense; or

ors.¹⁰⁰ In addition, the third time a youth is before the court charged with a juvenile petty offense, the prosecutor has the discretion to charge the child with either a petty offense or with a misdemeanor.¹⁰¹

With this new classification, the legislature changed the sentences available to the court for youths charged as petty offenders.¹⁰² No longer can courts sentence youths to out-of-home place-

(3) the county attorney designates the child on the petition as a juvenile petty offender, notwithstanding the child's prior record of misdemeanor-level juvenile petty offenses.

Id.

100. The exceptions are fifth degree assault, prostitution, arson, negligent fire, and indecent exposure; these offenses are not classified as petty. *Id.* These exceptions resulted partly from the concern that the new sentences were too lenient. See *supra* notes 87-88 and accompanying text (discussing this objection to the reduced sentences available).

101. Act effective July 1, 1995, ch. 226, art. 3, sec. 15, § 260.015(21)(b)(3), 1995 Minn. Laws 1176.

The county attorney also has the discretion to charge the youth under a child in need of protection or services (CHIPS) petition. MINN. STAT. § 260.015(2a) (1994). A CHIPS petition can be filed on behalf of a child for many reasons, including abandonment, abuse, or neglect. *Id.* During a committee meeting on this proposed legislation, Minnesota Chief Public Defender John Stuart suggested that juvenile misdemeanants could also be charged under subdivision nine of the CHIPS statute, stating that a child in need of protection or services can be "one whose behavior, condition, or environment is such as to be injurious or dangerous to the child or others." *Judiciary Fin. Meeting, supra* note 82 (citing MINN. STAT. § 260.015(2a)(9) (1994)). If charged in this way, the child defendant would have the right to counsel. Act effective July 1, 1995, ch. 226, art. 3, sec. 25, § 260.155(2)(a)(2), 1995 Minn. Laws 1180. The defendant, however, would then be susceptible to receiving out-of-home placement. MINN. STAT. § 260.191 (1994).

102. Act effective July 1, 1995, ch. 226, art. 3, sec. 34, § 260.195(3), 1995 Minn. Laws 1184.

If the juvenile court finds that a child is a petty offender, the court may:

- (a) require the child to pay a fine of up to \$100;
- (b) require the child to participate in a community service project;
- (c) require the child to participate in a drug awareness program;
- (d) place the child on probation for up to six months;
- (e) order the child to undergo a chemical dependency evaluation and if warranted by this evaluation, order participation by the child in an outpatient chemical dependency treatment program;
- (f) order the child to make restitution to the victim; or
- (g) perform any other activities or participate in any other outpatient treatment programs deemed appropriate by the court.

In all cases where the juvenile court finds that a child has purchased or attempted to purchase an alcoholic beverage in violation of section 340A.503, if the child has a driver's license or permit to drive, and if the child used a driver's license, permit or Minnesota identification card to purchase or attempt to purchase the alcoholic beverage, the court shall forward its finding in the case and the child's driver's license or permit to the commissioner of public safety. Upon receipt, the commissioner shall suspend the child's license or permit for a period of 90 days.

ment for these offenses.¹⁰³ The court, however, can still impose fines, community service, probation, restitution, outpatient forms of treatment for drug awareness and chemical dependency, or any other outpatient program.¹⁰⁴

In addition, when a child comes before the court on her third petty offense, she will no longer be charged as a juvenile petty offender, but, instead, as a juvenile delinquent.¹⁰⁵ Furthermore, on the second charge for an offense involving alcohol or a controlled substance, the court can impose a harsher sentence, including suspension, revocation, or denial of the child's driver's license or permit.¹⁰⁶ For the third offense involving alcohol or controlled

None of the dispositional alternatives described in clauses (a) to (f) shall be imposed by the court in a manner which would cause an undue hardship upon the child.

Id.

103. *Id.*

104. *Id.*

105. Act effective July 1, 1995, ch. 226, art. 3, sec. 15, § 260.015(21)(b)(1), 1995 Minn. Laws 1176. Even in this situation, however, the county attorney has the authority to designate the child as a petty offender despite that child's prior record. Act effective July 1, 1995, ch. 226, art. 3, sec. 15, § 260.015(21)(b)(3), 1995 Minn. Laws 1176; see also *supra* note 101 and accompanying text (discussing the prosecutorial discretion in these cases).

To some extent, this is just another part of the strange labelling system in the juvenile court. See *supra* note 3 (explaining terminology used in juvenile court). On the other hand, being labeled "delinquent" has serious sentencing consequences, subjecting the child to out-of-home placement, MINN. STAT. § 260.185 (1994), and may be used against the child at sentencing if later charged with an adult crime. See *infra* note 232 (explaining the effect of a delinquency finding on a later adult sentence).

106. MINN. STAT. § 260.195(3a) (1994). In addition to the penalties already provided for in the petty offender statute, on the child's second alcohol or controlled substance offense, the court can also impose any of the following sentences:

(b) If the adjudicated petty offender has a driver's license or permit, the court may forward the license or permit to the commissioner of public safety. The commissioner shall revoke the petty offender's driver's license or permit until the offender reaches the age of 18 years or for a period of one year, whichever is longer.

(c) If the adjudicated petty offender has a driver's license or permit, the court may suspend the driver's license or permit for a period of up to 90 days, but may allow the offender driving privileges as necessary to travel to and from work.

(d) If the adjudicated petty offender does not have a driver's license or permit, the court may prepare an order of denial of driving privileges. The order must provide that the petty offender will not be granted driving privileges until the offender reaches the age of 18 years or for a period of one year, whichever is longer. The court shall forward the order to the commissioner of public safety. The commissioner shall deny the offender's eligibility for a driver's license under section 171.04, for the period stated in the court order.

Id.

substances, the court has authority to order a chemical dependency evaluation and inpatient chemical dependency treatment.¹⁰⁷

The legislature also changed the appointment of counsel statute. Children charged as petty offenders no longer receive counsel.¹⁰⁸ While they are still free to retain private counsel if they can afford it, the court is not allowed to appoint counsel at public expense,¹⁰⁹ even if the judge believes it is necessary.¹¹⁰

These statutory amendments substantially diminished the right to counsel that the 1994 legislation had guaranteed to children.¹¹¹ On July 1, 1995, the current legislation took effect,¹¹² and this newly-created class of petty offenders no longer has the right to legal representation in the courts.

3. A Court Challenge

These amendments have already been challenged. In August of 1995, a fifteen-year-old girl was brought to juvenile court in Steele County for violating a curfew ordinance and consuming alcohol as a minor.¹¹³ In this case, *In re R.M.H.*, Judge Casey J. Christian appointed counsel for the accused.¹¹⁴ The Third District

107. MINN. STAT. § 260.195(4). For the third alcohol or controlled substance offense, in addition to the petty offender penalties, "the juvenile court shall order a chemical dependency evaluation of the child and if warranted by the evaluation, the court may order participation by the child in an inpatient or outpatient chemical dependency treatment program, or any other treatment deemed appropriate by the court." *Id.*

108. Act effective July 1, 1995, ch. 226, art. 3, sec. 25, § 260.155(2), 1995 Minn. Laws 1180.

(a) The child, parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court unless the child is charged with a juvenile petty offense as defined in section 260.015, subdivision 21. . . .

(b) If they desire counsel but are unable to employ it, the court shall appoint counsel to represent the child or the parents or guardian in any case in which it feels that such an appointment is desirable, except a juvenile petty offense as defined in section 260.015, subdivision 21.

Id.

109. Act effective July 1, 1995, ch. 226, art. 3, sec. 33, § 260.195, 1995 Minn. Laws 1184 ("A child alleged to be a juvenile petty offender may be represented by counsel, but does not have a right to appointment of a public defender or other counsel at public expense.").

110. Act effective July 1, 1995, ch. 226, art. 3, sec. 25, § 260.155(2), 1995 Minn. Laws 1180.

111. See *supra* notes 68-75 and accompanying text (describing the 1994 legislation).

112. Effective Dates, ch. 226, art. 7, sec. 27, 1995 Minn. Laws 1233.

113. Petition for Writ of Prohibition at 1, *In re R.M.H.* (3d Minn. Cir. Aug. 22, 1995) (No. J2-95-50352), *writ granted*.

114. Order, *In re R.H.* (3d Minn. Cir. Oct. 3, 1995) (No. J2-95-50352), *vacated*.

Public Defender refused to take the case,¹¹⁵ citing the new statutes and explaining that public defender services were no longer available for this petty offender.¹¹⁶ Judge Christian issued an order declaring that, by treating children differently than adults, these statutes violated the right to counsel provided by the Minnesota Constitution¹¹⁷ and the Due Process Clause of the United States Constitution.¹¹⁸ He further ordered the public defender to take this case and all other cases involving juvenile petty offenders.¹¹⁹ The Minnesota State Public Defender's office appealed, requesting a Writ of Prohibition from the Minnesota Court of Appeals quashing Judge Christian's order.¹²⁰

The Fourth District Public Defender filed an *amicus curiae* brief in support of Judge Christian's order, arguing that the new statutory regime violated the United States Constitution on equal protection grounds.¹²¹ The public defender pointed out that judges in similar situations in adult court would have the discretion to appoint counsel if they felt it was necessary.¹²² The public defender further alleged that children charged with petty offenses faced a loss of liberty and were therefore entitled to counsel under *Scott v. Illinois*.¹²³

115. Brief of *Amicus Curiae* at 3, Fourth District Public Defender, *In re R.H.* (3d Minn. Cir. Sept. 8, 1995) (No. C3-9-1793).

116. *Id.*

117. Memorandum, *In re R.M.H.* (3d Minn. Cir. Aug. 14, 1995) (No. J2-95-50352). "Juvenile proceedings are quasi-criminal in nature, and the state constitutional right to assistance of counsel should apply to these proceedings. The proceedings are tried before a judge and the State is required to prove the elements of the petition beyond a reasonable doubt." *Id.*

118. *Id.* "The legislative changes, concerning a juvenile's right to counsel, violate the Due Process Clause of the United States Constitution, by denying a juvenile the right to an attorney when an adult, in similar circumstances would be entitled to legal representation." *Id.*

119. Order, *In re R.H.* (3d Minn. Cir. Oct. 3, 1995) (No. J2-95-50352), *vacated*.

120. Petition for Writ of Prohibition, *In re R.M.H.* (3d Minn. Cir. Aug. 22, 1995) (No. J2-95-50352), *writ granted*.

121. Brief of *Amicus Curiae* Fourth District Public Defender at 10, *In re R.H.* (Minn. Ct. App. 1995) (No. C3-95-1793).

122. See *supra* notes 10-12 and accompanying text (describing the right to counsel for Minnesota adults).

123. Brief of *Amicus Curiae* Fourth District Public Defender at 10-11, *In re R.H.* (Minn. Ct. App. 1995) (No. C3-95-1793). The public defender argued that probation, community service, and counseling programs all entail a loss of liberty for the juvenile petty offender. *Id.*

The Fourth District Public Defender also argued that children face a greater loss of liberty than adults by comparing adult petty misdemeanants to juvenile petty offenders. *Id.* at 9. The juvenile petty offender is the equivalent of an adult misdemeanant. Act effective July 1, 1995, ch. 226, art. 3, sec. 15, § 260.015(21)(b), 1995 Minn. Laws 1176 (defining a petty offense as an offense "that would be a misdemeanor if committed by an adult"). These two groups, however, are not equivalent. An adult misdemeanant may receive a jail sentence of up to ninety days or a fine of

In October of 1995, the Minnesota Court of Appeals granted the Writ of Prohibition in part, but found that if there was a chance that this fifteen-year-old girl could face enhanced penalties due to the alcohol violation, the court could then appoint counsel.¹²⁴ With this minor variation, the Minnesota Court of Appeals upheld the statutory scheme denying juvenile petty offenders the right to counsel.¹²⁵ The order was based largely on the constitutional link between incarceration and the right to counsel established in *Scott v. Illinois*.¹²⁶ The court found that, except for the enhanced penalties available for alcohol and controlled substance offenses, a juvenile petty offender could not receive out-of-home placement, and, therefore, had no constitutional right to counsel.¹²⁷

This case failed to address the issue of the level of discretion the judge retains over the appointment of counsel for juvenile petty offenders who do not face the enhanced penalties. The court explicitly narrowed its decision to the fact that Judge Christian's order granted public defenders to *all* juvenile petty offenders.¹²⁸ The court of appeals found that he did not have such authority,¹²⁹ but did not say that a judge should not have the authority in certain cases.¹³⁰ Instead, the court remanded the decision to the district court for more specific findings on whether enhanced penalties would be possible.¹³¹ Thus, this case did not directly address the constitutionality of denying a judge the discretion to appoint counsel in cases where she believed an attorney was necessary or appropriate—the same power that a judge has in an adult criminal court.

This issue remains unresolved. While *In re R.M.H.* seems to suggest that judges have discretion to appoint counsel for juvenile

up to seven hundred dollars. MINN. STAT. § 609.02(3) (1994). Therefore, an adult misdemeanor is susceptible to a loss of liberty through confinement.

124. Order at 2, *In re R.H.* (Minn. Ct. App. 1995) (No. C3-95-1793). The court neither wrote nor published an opinion. Rather, it simply issued a three-page order providing a skeletal analysis of its decision.

125. *Id.*

126. 440 U.S. 367, 368 (1979). See *supra* notes 49-51 and accompanying text (describing the constitutional link between incarceration and the right to counsel).

127. Order at 1, *In re R.H.* (Minn. Ct. App. 1995) (No. C3-95-1793). The court's decision was largely based on the fact that "[t]he legislature has removed any possibility that first-time juvenile petty offenders will suffer detention as a result of their offense, even in the form of inpatient treatment." *Id.*

128. *Id.* at 2. "Petitioner has shown that the district court exceeded its authority in extending the right to counsel to all juvenile petty offenders. Petitioner has not shown, however, that the district court could not appoint counsel for R.H. or other individual juvenile petty offenders, particularly those who face the enhanced penalties" *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

petty offenders when enhanced penalties are available, it does not expressly grant judges the power to appoint counsel for other juvenile petty offenders. According to the statutes, juvenile judges do not have this power. The constitutionality of the remainder of these statutes should be subjected to both the equal protection and due process analysis.

II. Analysis

Ideally, no one of any age would appear in court without legal representation.¹³² Given current fiscal restraints, however, providing representation for all defendants is not feasible.¹³³ Because of the cost of public defenders, even adult defendants are not automatically provided an attorney.¹³⁴ Any adult defendant, however, can request that the court provide an attorney.¹³⁵ More importantly, the adult criminal court judge can grant that defendant an attorney whenever justice requires representation.¹³⁶ An analysis of these statutory amendments under the Due Process and Equal Protection Clauses illustrates that the child defendant must be given this same right.

A. An Equal Protection Analysis

1. The Appropriate Standard for Review

The first step in an equal protection analysis is to determine whether the statutes in question use a suspect classification or impinge on a fundamental right, thereby calling for strict scrutiny review.¹³⁷ Courts have consistently held that children are not a suspect class,¹³⁸ but this conclusion is questionable. The law denies children almost all civic and political rights, and grants them very little autonomy.¹³⁹ Courts often use a group's lack of political

132. This same hope was expressed several times in the legislature's discussion of these statutory changes. *Judiciary Fin. Meeting*, *supra* note 82. See *supra* notes 89-91 and accompanying text (describing the Minnesota House Committee on Judiciary Finance's discussion of this legislation).

133. Interview with John Stuart, *supra* note 80. See *supra* note 79 and accompanying text (discussing the fiscal limitations on the public defender system).

134. See *supra* notes 49-51 and accompanying text (describing adults' right to counsel).

135. *Id.*

136. *Id.*

137. See *supra* notes 26-28 and accompanying text (describing the applicable analysis when a fundamental right or suspect class is at issue).

138. See *supra* notes 30, 35 and accompanying text (citing cases holding that age is not a suspect classification).

139. In Minnesota, children do not have the right to vote, MINN. STAT. § 201.014(1)(a) (1994), and cannot serve on juries, MINN. GEN. R. PRAC., Rule 808(b)(2) (West 1995). A similar lack of autonomy and political power has often mo-

power as the prime indicator that a group deserves suspect class status.¹⁴⁰ Current precedent indicates, however, that the legal sys-

tivated the Court to find a classification suspect. See *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (finding classifications based on sex highly suspect). "Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property" *Id.* at 685. These same rights are denied to children based on the romantic misperception that children are innocent and incompetent. See Ainsworth, *supra* note 23, at 1091-95 (discussing the social construction and misperceptions of childhood).

This imposed ideal of innocence was also used for years as a basis for denying women equal protection of the law. "Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero*, 411 U.S. at 684. Because children are at risk of similar discrimination, they should at least be granted that level of scrutiny which applies to gender classifications. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to a statute treating males differently than females regarding the legal drinking age).

In addition, children are subject to an alarming amount of abuse at the hands of adults. This abuse may be emotional, sexual, or physical, and is often fatal. Rachel L. Jones, *Life Becoming Worse for American Kids, Welfare Activists Say*, ST. PAUL PIONEER PRESS, Feb. 8, 1996, at A1 (citing 1996 Children's Defense Fund and National Low Income Housing Coalition studies finding that three children die in America every day from abuse and neglect). Pervasive abuse is especially relevant to the discussion of juvenile courts because childhood abuse increases the chances for future delinquency by forty percent. CATHY SPATZ WIDOM, NAT'L INST. OF JUSTICE, U.S. DEPT OF JUSTICE, *THE CYCLE OF VIOLENCE* 1 (1992).

While abuse in itself is not a traditional sign of a suspect class, it is one indication of the "purposeful unequal treatment" to which children have been subjected. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (discussing "traditional indicia of suspectness"). Children need additional protection because courts have been unwilling to protect them from such violence. See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 202 (1989) (holding that "the State had no constitutional duty to protect Joshua," a four-year-old boy, from physical abuse resulting in permanent injury); *Ingraham v. Wright*, 430 U.S. 651, 656-57, 664 (1977) (holding that corporal punishment in public schools did not violate the Constitution although the child suffered a hematoma requiring medical attention as a result of a paddling inflicted with a two-foot long, one-half inch thick wood board).

Moreover, children between the ages of 12 and 17 are more likely than adults to be the victims of crime and hostility. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CENTER FOR JUVENILE JUSTICE, U.S. DEPT OF JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: A FOCUS ON VIOLENCE* 14 (1995); see *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (arguing that one reason homosexuals should be considered a suspect class is because they have been the object of hostility).

For a thorough discussion of the institution of childhood in America in relation to constitutional protections, see Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response* to Deshaney, 105 HARV. L. REV. 1359 (1992).

140. See, e.g., *Frontiero*, 411 U.S. at 685 (reasoning that gender is a suspect classification because women had been denied the right to vote); *Rodriguez*, 411 U.S. at 28 (listing "political powerlessness" as one of the defining characteristics of a suspect class); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (stating that a classification requires special scrutiny when that class cannot rely on the "political processes").

tem is unlikely to accept the proposition that children are a suspect class.¹⁴¹

Therefore, the only feasible way to obtain strict scrutiny review in this case is to find that there is a fundamental right at issue. Under current jurisprudence, the right to counsel in the criminal context is only fundamental if the judge imposes incarceration.¹⁴² In the juvenile system, being placed outside the home is the equivalent of incarceration, whether one is placed in a training school, an inpatient treatment program, or any other institution.¹⁴³ Under the new statutes, children cannot be placed outside the home, at least initially, for a petty offense.¹⁴⁴ On this basis, the right to counsel for all juvenile petty offenders is not fundamental under *Scott v. Illinois*.¹⁴⁵

The issue changes slightly, however, when a child is charged with her third petty offense and the county attorney has the option to prosecute her as a misdemeanor rather than a petty offender.¹⁴⁶ Of course, once a child is charged as a "delinquent," she will have the right to counsel.¹⁴⁷ The issue is also different when children are charged with a second or third alcohol or controlled substance offense, making enhanced sentences available.¹⁴⁸ Because of the increased severity of sentencing options in such instances, a judge has the discretion to appoint an attorney.¹⁴⁹ Considering that upon a conviction for one of these charges a child

141. See *supra* notes 30, 35 and accompanying text (citing cases that hold children are not a suspect class).

142. See *supra* notes 49-51 and accompanying text (discussing the constitutional limits on the right to counsel).

143. See Robert S. Catz & Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397, 410 (1984); *Right to Counsel*, *supra* note 21, at 1229.

144. Act effective July 1, 1995, ch. 226, art. 3, sec. 34, § 260.195(3), 1995 Minn. Laws 1184. Children can, however, receive enhanced penalties for later offenses, especially if alcohol or a controlled substance is involved. See *supra* notes 105-07 and accompanying text (describing the enhanced penalties available).

145. See *supra* notes 49-51 and accompanying text (explaining the federal standard for right to counsel).

146. Act effective July 1, 1995, ch. 226, art. 3, sec. 15, § 260.015(21)(b)(3), 1995 Minn. Laws 1806.

147. Act effective July 1, 1995, ch. 226, art. 3, sec. 25, § 60.155(2), 1995 Minn. Laws 1180.

148. MINN. STAT. § 260.195(3a)-(4) (1994).

149. Order at 2, *In re R.H.* (Minn. Ct. App. 1995) (No. C3-95-1793). The Minnesota Court of Appeals has already addressed this issue, see *supra* part I.D.3, therefore this article focuses mainly on the child's right to counsel for any petty offense, even when enhanced penalties are not available.

may receive inpatient treatment, this is consistent with the constitutional limits of the right to counsel.¹⁵⁰

Precedent indicates that the right to counsel for all juvenile petty offenders is not fundamental.¹⁵¹ If it were, the statutes would be subject to strict scrutiny, and the government would have the burden of proving that the statutes are narrowly tailored to meet compelling state interests.¹⁵² It is unlikely they would meet this burden given that the state interest is primarily fiscal.¹⁵³ By simply giving judges the discretion to appoint counsel when necessary, legislators could save money without leaving children unprotected,¹⁵⁴ thereby showing that the means used are not narrowly tailored to the goal. The legislation, however, would only have to pass this test if the court applied strict scrutiny to the legislation.

If the courts do not find that this right is fundamental, which they probably will not,¹⁵⁵ and if they do not find that children are a suspect class, which they most certainly will not,¹⁵⁶ the courts will apply only rational basis review. Even under the rational basis test, this legislation could still fail.

2. Rational Basis Review

The federal rational basis test is very deferential to the government,¹⁵⁷ with the court asking whether the means used are rationally related to legitimate state goals.¹⁵⁸ The state's primary

150. *Argersinger v. Hamlin*, 407 U.S. 25, 25 (1972) ("[N]o person may be imprisoned for any offense, whether classified as petty misdemeanor, or felony, unless he was represented by counsel at his trial."). See also *supra* notes 49-51 and accompanying text (explaining the limits of the right to counsel).

151. This precedent, however, is flawed. If children require a separate system of justice because they need more protection than adults, they should not receive less procedural protection in juvenile court than they would have received in adult court. The right to counsel for all children should be fundamental. See *infra* note 183 and accompanying text (discussing further the logical fallacy in giving children less protection in the juvenile courts).

152. See *supra* notes 26-28 and accompanying text (describing the application of strict scrutiny review).

153. See *supra* notes 89-91 and accompanying text (describing the Minnesota House Committee on Judiciary Finance's discussion of this legislation).

154. See *infra* notes 218-19 and accompanying text (discussing the fiscal effects of granting children equal rights in this area).

155. See *supra* notes 142-45 and accompanying text (explaining the nature of this right).

156. See *supra* notes 30, 35 and accompanying text (citing cases that hold children are not a suspect class).

157. See, e.g., *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (stating the presumption that state laws are valid); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976) (asserting that exact precision is not required in legislation that relies on classifications).

158. See *supra* note 29 and accompanying text (explaining the rational basis test).

goal in the 1995 legislation taking away juvenile petty offender's right to counsel was to save money.¹⁵⁹ As a result of the Carlson veto, the public defender offices were incapable of handling the increased number of juvenile cases which resulted from the 1994 juvenile justice legislation.¹⁶⁰ The legislature chose to resolve this dilemma by reducing public defender caseloads rather than reallocating resources in a way that would allow the public defender system to operate effectively.

The first question is whether saving money from a strained state budget is a legitimate interest. Given the current limited resources and taxpayers' unwillingness to contribute more to the state budget,¹⁶¹ it may be a legitimate state interest. Nevertheless, the legislation must be rationally related to that interest.¹⁶² Under rational basis review, the Supreme Court will hypothesize rationales for the state.¹⁶³ If the Justices can imagine any plausible reason to uphold the legislation, they will do so.¹⁶⁴ To come up with such a rationale, the courts can look to the traditional view of the roles juvenile court personnel play. Everyone within the system seems to be working for the child defendant: the county attorney, the judge, the social workers, and the parents are all presumed to be acting in the best interests of the child.¹⁶⁵ Further, the child defendant is deemed incapable of making decisions for herself.¹⁶⁶

159. See *supra* notes 89-91 and accompanying text (describing the discussion surrounding this legislation in the House Committee on Judiciary Finance).

160. Interview with John Stuart, *supra* note 80. See also *supra* note 79 and accompanying text (describing the overburdened public defender system).

161. See Spangenberg & Schwartz, *supra* note 77, at 53 (discussing the lopsided funding caused by current politics); Interview with John Stuart, *supra* note 80 (describing the difficulty of obtaining additional funding for public defender services).

162. See *supra* note 29 and accompanying text (explaining the rational basis test).

163. See *supra* note 32 and accompanying text (describing the application of the federal rational basis test).

164. *Id.*

165. "Juvenile justice practitioners enjoy greater discretion than do their adult process counterparts because of their presumed need to look beyond the present offense to the 'best interest of the child' and paternalistic assumptions about the control of children." *Right to Counsel*, *supra* note 21, at 1225. This can lead to role confusion for public defenders in juvenile court. They often do not know whether they should be zealously advocating for their client's legal rights or ensuring that their client's social needs are addressed. Ainsworth, *supra* note 23, at 1129-30.

166. "[J]uvenile court professionals all too frequently assume that juvenile accuseds are incapable of exercising sound judgement in making the decisions that affect their cases." Ainsworth, *supra* note 23, at 1120. This assumption of incompetency has been explicitly asserted by other child welfare professionals as well. "Counsel cannot turn directly to the children whom he represents for his instructions. Children are by definition persons in need of adult caretakers who determine what is best for them." JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 122 (1979).

The court is operating on the child's behalf at the outset, so there is no need for an extra person to advocate for the child.¹⁶⁷

The adult system operates on a completely different assumption.¹⁶⁸ No one assumes that the county attorney is prosecuting the defendant in order to keep her from a downward spiral into a life of crime. Rather, it is assumed that the adult defendant has a mind of her own, willingly chose to commit the illegal act, and deserves to be punished for her offense.¹⁶⁹ Moreover, the adult court judge is to be a neutral party weighing the evidence, and meting out punishment, but certainly not acting in the best interests of the criminal defendant.

Our view of the two systems' differing roles is not realistic. The juvenile court is becoming increasingly punitive.¹⁷⁰ Almost every state's juvenile code contains a purpose clause, which lays out the functions and ideals of that state's juvenile courts.¹⁷¹ Previously almost all juvenile purpose clauses professed that the juvenile system was meant as a place for treatment and rehabilitation.¹⁷² In the last twenty years, however, these clauses have been amended to include a call for punishment and public safety.¹⁷³ The juvenile court workers are no longer working only for the best inter-

167. See THEODORE J. STEIN, *CHILD WELFARE AND THE LAW* 81 (1991). In the first juvenile courts, judges often used this rationale to exclude lawyers from the juvenile courtroom. See ROTHMAN, *supra* note 17, at 216 (noting that a paternalistic juvenile court could not be bound by formal and technical rules).

168. The differing assumptions of the juvenile court rest on the notion of *parens patriae*, "the state as the parent of the child." ROTHMAN, *supra* note 17, at 212. Because adults are considered autonomous beings, this doctrine is inapplicable to the adult court system. See *infra* note 169 and accompanying text.

169. See John E. Coons et al., *Puzzling Over Children's Rights*, 1991 B.Y.U. L. REV. 307, 327 (1991) (noting that Americans hold adults accountable because they assume adults have free will); Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 B.Y.U. L. REV. 351, 379 (1991) (observing that the courts assume that adults make autonomous decisions about their own conduct).

170. See, e.g., Ainsworth, *supra* note 23, at 1106-08 (describing the new juvenile court regime in Washington state); Barry C. Feld, *The Punitive Juvenile Court and the Quality of Procedural Justice: Disjunctions Between Rhetoric and Reality*, 36 CRIME & DELINQ. 443, 454 (1990) [hereinafter *Procedural Justice*] (discussing the daily life of incarcerated juveniles); Julianne P. Sheffer, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 485-86 (1995) (noting that the juvenile system has become more punitive).

171. See, e.g., MINN. STAT. ANN. § 260.011(2)(c) (West 1992).

172. Before 1980, the Minnesota code merely provided that the "paramount consideration" in all juvenile proceedings was the "best interest of the child." *Id.* § 260.011(2)(a).

173. *Id.* ("The purpose of the laws relating to children alleged or adjudicated to be delinquent is to promote the public safety . . ."). This section was added in 1980. *Id.* Other states changed their juvenile purpose clauses as well. For example, in 1977, California added "protection and safety of the public" to its purpose clause, CAL. WELF. & INST. CODE § 202(a) (West Supp. 1996), while in 1988, the Utah legis-

ests of the child, but also for the best interests of the public. Therefore, there is a need for an extra person to advocate for the child. As the juvenile court system is incredibly resistant to any major reform,¹⁷⁴ however, it is unlikely that the current Supreme Court will accept a new view of the juvenile court in order to defeat legislation such as this.

Minnesota courts, however, operate under a different standard of review.¹⁷⁵ If no fundamental right or suspect classification is at issue, Minnesota courts will also use a rational basis test, but the application of this test is stricter.¹⁷⁶ The Minnesota standard requires that the legislature have given an actual justification for the classification and the differential treatment.¹⁷⁷ Under this test, the government is required to prove that there is an actual legitimate state interest and that the means used are sincerely related to the desired goal.¹⁷⁸

This heightened standard requires that the court look at the juvenile system as it really exists. As the societal vision of the juvenile justice system changes, and the underlying philosophy becomes more punitive,¹⁷⁹ the idea that juvenile court workers are already working on behalf of the child is an insufficient rationale for differential treatment under the heightened standard. Often, the main difference between adult and juvenile court is a lack of procedural parity between the two.¹⁸⁰ If the two systems are the same, there can be no rational basis for differential treatment.¹⁸¹

lature rewrote its purpose statute to call for "public safety and individual accountability." UTAH CODE ANN. § 78-3a-1(1) (1995).

174. "[E]ven today, the [juvenile court] program continues to attract dedicated support and remains surprisingly invulnerable to fundamental change." ROTHMAN, *supra* note 17, at 205.

175. See *supra* notes 31-34 and accompanying text (explaining Minnesota's heightened standard of rational basis review).

176. *Id.*

177. *Id.*

178. *Id.*

179. See, e.g., Ainsworth, *supra* note 23, at 1106-08 (describing the shift to a punitive, offense-based philosophy in the juvenile court system); see also *supra* notes 170-73 and accompanying text (observing the emerging punitive purposes of juvenile courts).

180. See, e.g., Ainsworth, *supra* note 23, at 1119 (concluding that "the procedural contrast between the [adult and juvenile] systems is the most salient feature of the juvenile justice system"); *Procedural Justice*, *supra* note 170, at 444 (stating that "the sole distinguishing characteristic [of the juvenile system] is its persisting procedural deficiencies").

181. See Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment and the Difference It Makes*, 68 B.U. L. REV. 821, 909-14 (1988) (analyzing the move toward a philosophy of punishment in the juvenile court and arguing that this shift creates an increased need for procedural parity between the child and adult systems).

If, however, we continue to accept the notion that the two systems are philosophically different, then the differing standards must be analyzed in light of those philosophies. A separate court system for children was created and is maintained on the belief that children are more vulnerable than adults and, therefore, need more protection.¹⁸² Based on this philosophy, there is no rational basis for giving children less protection in the courts than adults receive. On the contrary, based on this philosophy, children should have a more extensive right to counsel than adults because they are more vulnerable and need more protection.¹⁸³

This heightened protection argument, however, may not succeed even under the Minnesota standard. In a recent decision, *In re K.C.*,¹⁸⁴ the Minnesota Court of Appeals upheld an age-based distinction using the heightened rational basis test.¹⁸⁵ Children who are sixteen years of age and older are treated differently than children under sixteen for purposes of juvenile court waiver, the process used to certify a child to stand trial in adult court.¹⁸⁶ The court upheld this distinction on the basis that the juvenile courts dispense treatment, not punishment, and treatment takes time.¹⁸⁷ The court of appeals considered it rational to treat children sixteen years and older differently from children under sixteen.¹⁸⁸ While the decision did not involve a classification separating children from adults, it did involve accepting the notion that juvenile courts dispense treatment and therefore people of different ages can be treated differently.

Since the age-based classification in *In re K.C.* was a distinction between children under age sixteen and children over sixteen,¹⁸⁹ it can be distinguished from a challenge to the new legislation which differentiates between children and adults. This case demonstrates, however, that the Minnesota courts are still

182. See *supra* note 18 and accompanying text (describing the philosophy upon which the segregated court system was founded).

183. A similar argument was made in *In re Brown*, 439 F.2d 47, 52 (3d Cir. 1971). *Brown* held that children had an automatic right of appeal without having to obtain a special allowance from the court. *Id.* at 54. The court reasoned that the "informality and flexibility of the juvenile adjudication and the subsequent treatment make the right to appeal perhaps more, and certainly not less, vital to safeguard those subject to the juvenile process from the possible degeneration warned against in *Gault*." *Id.* at 52.

184. 513 N.W.2d 18 (Minn. Ct. App. 1994).

185. *Id.* at 23.

186. MINN. STAT. § 260.125(2)-(3a) (1994).

187. *K.C.*, 513 N.W.2d at 23. This is the typical rationale given for punishing children differently than adults. See *supra* note 36 and accompanying text.

188. *K.C.*, 513 N.W.2d at 23.

189. *Id.*

willing to accept the notion of the juvenile court as a munificent, treatment-oriented institution. Even under Minnesota's heightened rational basis analysis, an equal protection challenge to these statutory changes may not succeed.

B. *The Due Process Balancing Test*

While a traditional rational basis analysis may not effectively defeat these legislative changes, when procedural rights for children are at issue, the courts often use a hybrid analysis incorporating both due process and equal protection concerns.¹⁹⁰ This combined analysis involves a balancing test, whereby the courts weigh the right asserted against the effect granting the right will have on the juvenile court system.¹⁹¹ Through this balancing test, the court determines whether the child must be granted the same procedural due process as an adult.¹⁹²

First, the right itself must be analyzed. As discussed previously, there is no fundamental right at issue.¹⁹³ Counsel is only mandated when actual incarceration will occur,¹⁹⁴ or, under Minnesota law, when the statute authorizes incarceration for that offense.¹⁹⁵ Under these new statutes, juveniles cannot receive sentences which involve out-of-home placement,¹⁹⁶ and, therefore, the fundamental constitutional right to counsel is not at issue. Even though the right is not fundamental per se, courts may scrutinize the right more carefully by looking to its underlying function.

In *McKeiver v. Pennsylvania*,¹⁹⁷ where the child's right to a jury was at issue, the Supreme Court looked at the underlying function the right was meant to serve.¹⁹⁸ The Court analyzed the underlying function of a jury,¹⁹⁹ and concluded that a jury's main

190. See *supra* notes 37-46 and accompanying text (describing the balancing test and its application).

191. *Id.*

192. *Id.*

193. See *supra* notes 142-45, 155 and accompanying text (concluding that this right is not fundamental).

194. See *supra* notes 49-51 and accompanying text (discussing the federal limits on the right to counsel).

195. See *supra* notes 54-55 and accompanying text (describing the right to counsel for Minnesota adult defendants).

196. Act effective July 1, 1995, ch. 226, art. 3, sec. 34, § 260.195(3), 1995 Minn. Laws 1184. There may be a possibility of out-of-home placement if the child is charged with a petty offense for which enhanced penalties are available. See *supra* notes 105-07 and accompanying text (describing the possibility of enhanced penalties).

197. 403 U.S. 528 (1971).

198. *Id.* at 547.

199. *Id.* at 543.

function was to serve as a fact-finder for the case.²⁰⁰ In many situations, judges also serve as the fact-finder.²⁰¹ The Court went on to discuss the effect of injecting the jury system into juvenile courts,²⁰² concluding that the jury trial would "remake the juvenile proceedings into a fully adversary process," and end the "idealistic prospect of an intimate, informal protective proceeding."²⁰³ Balancing what it saw as an extremely negative effect on the informality of the juvenile courts with the conclusion that a judge can serve as fact-finder as well as a jury, the Court concluded that children neither have nor need the right to a jury trial.²⁰⁴

The new statutory amendments involve whether the right to counsel, and the function served, is different. The attorney serves as the legal advisor for the defendant as well as the protector of the defendant's legal rights. Within the juvenile court system, no other court worker can perform this function as effectively.²⁰⁵ The county attorney represents the legal interests of the state and the judge serves as fact-finder, but only counsel for the accused can provide true legal advocacy.²⁰⁶ Therefore, not only is the right of legal representation important, but it can only be effectuated by an attorney.

The right granted to adults in similar cases provides that the criminal defendant can request counsel and the court can provide counsel when justice so requires.²⁰⁷ The court has discretion to appoint counsel when necessary.²⁰⁸ For example, if the defendant seems especially vulnerable, the case seems complex, or if the processing of the case seems questionable, the judge can appoint an attorney for the defendant.²⁰⁹ Making the child's right equal to the adult's right requires only that: return the discretion to the juvenile judge to appoint counsel for the child defendant any time it is necessary.

200. *Id.*

201. *Id.*

202. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543-45 (1971).

203. *Id.*

204. *Id.* at 547. The Court went on to say that there is nothing to stop a juvenile court judge from using a jury when there is a need. *Id.* at 548.

205. *See, e.g., Fare v. Michael C.*, 442 U.S. 707, 719 (1979) ("Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts.").

206. *See, e.g., id.* at 720-21 (concluding that a child's probation officer could not represent that child's legal interests).

207. *See supra* notes 10-12 and accompanying text (explaining Minnesota adults' right to counsel).

208. *Id.*

209. *Id.*

If Judge Christian would have had this power, he could have successfully appointed counsel for R.M.H., the fifteen-year-old girl arrested for curfew and alcohol violations.²¹⁰ In the case of Allison, our hypothetical thirteen-year-old, when the judge realized that she was unsure of the offense charged, the judge could have appointed counsel to help her figure it out. This is the right currently denied to juvenile petty offenders.

Now that the right has been analyzed, the effect that this right will have on the juvenile court system must be considered.²¹¹ When applying this prong of the test, courts emphasize that the juvenile court system is meant to be an informal and individualized institution, and they analyze the effect that such a right would have on these components of the system.²¹² Granting courts the right to appoint counsel when the child defendant makes a request does not negatively affect the juvenile court's informality or its individualized case processing. Since the landmark decision in *In re Gault*, lawyers are supposed to be in the juvenile courts.²¹³ Even under the new statutory regime, lawyers will appear in juvenile courts on behalf of children charged with acts of delinquency and children petitioned in need of protection and services.²¹⁴ It is only juvenile petty offenders who will come to court without an attorney.²¹⁵ Providing counsel for this one group of children will not significantly affect the informality of the Minnesota juvenile courts.

In addition, providing counsel for juvenile petty offenders will have little or no effect on the individualized treatment juveniles are supposed to receive. Despite the presence of counsel, there will still be social workers, school workers, and social history reports, all of which can be considered in sentencing the youth.²¹⁶ The presence of counsel will only guarantee that juvenile petty offenders will

210. See Petition for Writ of Prohibition at 1, *In re R.M.H.* (3d Minn. Cir. Aug. 22, 1995) (No. J2-95-50352) (giving the facts of the case which became the court challenge to these statutory changes), *writ granted*.

211. See *supra* notes 37-46 and accompanying text (describing the balancing test and its application).

212. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (examining the effect of a jury trial on "the idealistic prospect of an intimate, informal, protective proceeding"); *In re Winship*, 397 U.S. 358, 366-67 (1970) (concluding that the requirement of proof beyond a reasonable doubt would not affect individualized treatment).

213. *In re Gault*, 387 U.S. 1, 41 (1967).

214. Act effective July 1, 1995, ch. 226, art. 3, sec. 25, § 260.155(2), 1995 Minn. Laws 1180. In fact, for the same offense, the county attorney has the discretion to petition the child as a petty offender or as a child in need of protection and services. See *supra* note 101 (explaining the effect of the county attorney's choice).

215. Act effective July 1, 1995, ch. 226, art. 3, sec. 25, § 260.155(2), 1995 Minn. Laws 1180.

216. MINN. R. JUV. P. 30.03.

have an advocate who can explain their legal rights to them and protect them from arbitrary decision-making.²¹⁷

If this were the end of the analysis, it seems clear that at least some juvenile petty offenders should be given the right to counsel. The right is an important one, and conferring this right would have a minimal effect on the system. This is not the end of the analysis, though, as the fiscal restraints on the public defender system remain.

If the public defender system must represent all children without a substantial increase in funding, services to all indigent defendants, adults and children alike, will suffer.²¹⁸ This is unacceptable. If, however, juvenile petty offenders are granted the same right to counsel as that which is granted to adult misdemeanants, the burden on the public defender's office will be minimal,²¹⁹ while the protection granted to juvenile petty offenders who truly need legal representation may be substantial. With a change in the legislation creating parity between the two systems, the legislature can grant this important right to children on a case-by-case basis without a significant effect on the juvenile court system.

Under the balancing test, the differential treatment between children and adults cannot stand. While the right to counsel in these cases may not be fundamental per se, the underlying function served by the right is an important one that can only be effectuated by the presence of an attorney. An attorney's presence will not detract from the informality of the current juvenile system or negatively affect individualized sentencing of the child defendant. Admittedly, the current fiscal restraints on the public defender system are overwhelming, but parity between the adult's right and the child's right can be created without a substantial strain on the state's resources. Parity only requires that the juvenile court judge

217. The Task Force on the Juvenile Justice System recognized the important functions that defense counsel should fulfill. TASK FORCE, *supra* note 65, at 48. Defense counsel should "ensure that the adjudication process is fair and valid" and that counsel "presents dispositional alternatives to the court." *Id.* In addition, adequate defense counsel must help the child defendant and her or his parents or guardians obtain a "better understanding of the juvenile court process." *Id.* at 49.

218. Interview with John Stuart, *supra* note 80. See also *supra* note 79 and accompanying text (discussing the overburdened public defender system).

219. It is difficult, if not impossible, to come up with a precise figure for the cost of public defender services. In the past, public defender services for children have been funded on a local level. JUVENILE REPRESENTATION, *supra* note 58, at 23. Each county or district may keep track of these expenditures in a different way. *Id.* Because of this, it is difficult to find the figures that apply only to juvenile defense. *Id.* The Task Force on the Juvenile Justice System had similar problems. TASK FORCE, *supra* note 65, at 50. However, since parity of procedural rights only requires that the judge have the power to appoint counsel when necessary or when requested, any increase in caseload should be minimal.

have discretion to appoint counsel for petty offenders when the defendant requests counsel or when it is necessary as a matter of justice. These new statutes should fail under the balancing test.

Further, allowing juvenile court judges to appoint counsel on a case-by-case basis is consistent with the Supreme Court decisions that require this approach in quasi-criminal proceedings.²²⁰ If a court determines that a specific child in a specific case needs counsel based on the requirement of fundamental fairness,²²¹ that court must provide an attorney for that defendant so as not to violate the child's due process rights. As scholars have pointed out, "even when determined on a case-by-case basis, an indigent's right to appointed counsel is of constitutional significance when it attaches."²²²

C. Policy Concerns

Even without a new court challenge against the statutes, the Minnesota legislature has a duty to reexamine the statutory changes and the policy issues they raise, examining any benefits that these statutes provide to children and retaining those benefits. In addition, the legislature should look at the effect on children of diminished procedural protections. As Representative Macklin observed during committee hearings, these statutes implemented a substantial policy change with minimal legislative discussion of the issues involved.²²³ While this is probably true of many statutory changes that take place, these statutes were never even addressed by the entire Judiciary Committee.²²⁴ Some discussion of the policy issues involving children's right to counsel is necessary for a re-examination of the 1995 amendments.

1. The Benefit of Decriminalization

Despite the many negative aspects of the statutory amendments, there is at least one component benefitting children in the juvenile court system. Under the 1995 amendments, petty offenses are decriminalized, reducing the severity of sentencing options and

220. See *supra* notes 52-53 and accompanying text (describing the right to counsel in quasi-criminal contexts).

221. This is also the measurement of due process in the juvenile court context. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

222. Catz & Firak, *supra* note 143, at 439.

223. See *supra* notes 85-86 and accompanying text (describing this objection to the way in which the statutory changes were introduced).

224. *Id.*

the stigma attached to such offenses.²²⁵ When children are brought into court for petty offenses, they can no longer be placed outside the home.²²⁶ Previously, the sentencing options available to judges for such minor transgressions were almost limitless.²²⁷ The judge was to impose an individualized sentence based on the offender rather than on the severity of the offense.²²⁸ Under the old system, a child could be placed in a group home, a training school, or any other form of inpatient treatment for one of these minor offenses.²²⁹

In addition, under the new scheme, juvenile petty offenders are no longer labeled as delinquents for these minor infractions.²³⁰ Under the 1995 amendments, a child must be found guilty of a petty offense at least three times before the court can label that child delinquent or place that child outside the home.²³¹ One of the

225. The Juvenile Representation Study Committee also recommended that minor offenses be decriminalized: "A significant amount of time, effort, and money could be saved if . . . minor cases were decriminalized, eliminating the need for appointment of counsel and the presence of the prosecutor." JUVENILE REPRESENTATION, *supra* note 58, at 26.

226. Act effective July 1, 1995, ch. 226, art. 3, sec. 34, § 260.195(3), 1995 Minn. Laws 1184. Out-of-home placement may be possible if enhanced penalties are available. *See supra* notes 105-07 (explaining the use of enhanced penalties).

227. Although a list of dispositions was delineated, a catch-all existed giving the judge substantial discretion. MINN. STAT. § 260.195(3)(f) (1994). The judge could require the child to "perform any other activities or participate in any other treatment programs deemed appropriate by the court." *Id.* This catch-all is still included in the new statutes, only treatment programs have been limited to outpatient settings, at least for the initial charge. Act effective July 1, 1995, ch. 226, art. 3, sec. 34(3)(g), § 260.195(3), 1995 Minn. Laws 1184. Now, the judge can merely require the child to "perform any other activities or participate in any other *outpatient* treatment programs deemed appropriate by the court." *Id.* (emphasis added).

228. *See supra* note 20 and accompanying text (describing the negative effects of maintaining an individualized system).

229. MINN. STAT. § 260.195(3).

230. Act effective July 1, 1995, ch. 226, art. 3, sec. 15, § 260.015(21)(c), 1995 Minn. Laws 1806. These statutes, however, do not completely deinstitutionalize the social controls over children charged with petty offenses. After all, these children are still being brought into the system. While the initial dispositions cannot include out-of-home placement, in certain circumstances, the penalties that remain can be severe. A \$100 fine for a young child may be excessive. Act effective July 1, 1995, ch. 226, art. 3, sec. 34(3)(a), § 260.195(3), 1995 Minn. Laws 1184. Six-months' probation can be very restrictive given the intrusiveness of the probation system. *Id.* at sec. 34(3)(d); *see also* Brief of *Amicus Curiae* Fourth District Public Defender at 11, *In re R.H.* (Minn. Ct. App. 1995) (No. C2-95-1793) (arguing that probation is a substantial restriction on liberty). Because these penalties can be quite severe to certain youth, the complete absence of counsel is not justified merely by taking away the option of out-of-home placement.

231. Act effective July 1, 1995, ch. 226, art. 3, sec. 15, § 260.015(21)(b)(1), 1995 Minn. Laws 1806. *But see supra* notes 105-07 and accompanying text (explaining the possibility of more severe penalties when alcohol or other drugs are involved).

many problems with pulling children into the system unnecessarily is the stigma associated with being labeled delinquent.²³²

Of course, it would be worse if these children could be incarcerated for such petty offenses. To protect children from excessive punishment and to limit the discretion of the juvenile court judge, the legislature should retain reduced sentencing options. When the legislature reexamines the statutory changes it has implemented, it must consider the benefit of such reduced sentences and the advantage of placing limits on the sentences that judges are allowed to give to children.²³³ In addition to discussing these benefits, the legislators should also discuss any negative effects this new system will have on children charged as petty offenders.

2. The Disadvantage of a Lower Standard

The 1995 statutory amendments give children less procedural safeguards than adults. This type of disparate treatment can significantly influence the child's view of the entire justice system. Children know what a justice system should look like.²³⁴ Upon fac-

232. BORTNER, *supra* note 18, at 9-10. It is not only the label, though, that causes the stigmatization. *Id.* The mere fact of having to go to court is stigmatizing. *Id.* Probation, community service, or outpatient counseling can further stigmatize youth. *Id.* Thus, participation in the juvenile court system in and of itself can stigmatize a child. *Id.*

The delinquent label can also have profound effects on a child's future. Adult courts can now use juvenile delinquency offenses in determining an adult defendant's sentence for an adult crime. MINN. SENTENCING GUIDELINES, Guideline 11.B, MINN. STAT. ANN. ch. 244. The Minnesota Court of Appeals has approved this use of juvenile records. *State v. Little*, 423 N.W.2d 722, 724 (Minn. Ct. App. 1988). Under this scheme, only juvenile felony-level offenses can be used in adult sentencing, but "prior adjudications [for petty offenses] directly affect juvenile sentencing" in the first instance. David Dormont, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1800 (1991).

233. The legislature is already moving toward giving juvenile court judges less discretion in sentencing. See Judicial District Delinquency Disposition Principles, 1994 Minn. Laws 567 § 59 (requiring judges to publish written criteria for use in all juvenile delinquency sentencing). Some states have gone even further and have sentencing guidelines in place for children as well as adults. See, e.g., WASH. REV. CODE ANN. § 13.40.030 (West 1995) (containing the juvenile sentencing guidelines).

One scholar has argued that limiting juvenile court discretion in this way will eradicate unequal application of the juvenile law and promote accountability among both juvenile court judges and children who commit crimes. Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907, 925-26 (1995). Another commentator has rejected this movement and concluded that the discretionary treatment-oriented model is more effective. Jeffrey K. Day, *Juvenile Justice in Washington: A Punitive System in Need of Rehabilitation*, 16 U. PUGET SOUND L. REV. 399, 459-60 (1992).

234. Ainsworth, *supra* note 23, at 1119. One juvenile court judge concluded that because of their past experiences, children who come before the court possess a "maturity which is normally acquired much later in life. They are generally well aware

ing the juvenile system, however, many children are surprised at what they find. Courtroom procedures are relaxed, the courtrooms themselves are often small and informal,²³⁵ and now, in Minnesota, juvenile petty offenders will discover that they do not have the right to an attorney as they may have expected.

Many scholars have concluded that such informality in the juvenile court creates in children a great disrespect for the system.²³⁶ Rather than legitimizing social norms, the apparently arbitrary enforcement of "law" in the juvenile courtroom reinforces the belief that adults are just "out to get them."²³⁷ Children come to believe that justice is not for them as they face what the United States Supreme Court has called a "kangaroo court,"²³⁸ a mere illusion of justice. Allison, our hypothetical thirteen-year-old, could be coerced into pleading guilty to a charge of which she has no knowledge, and be punished accordingly. Under the new statutory amendments, she could face a substantial fine, several hours of community service, or extensive outpatient treatment.²³⁹ Such treatment would certainly not teach her that the justice system is fair, or that courts, judges, and the law are to be respected.

Juvenile court workers who continue to believe that the juvenile system's main goal is rehabilitation have stated that disrespect for the system can inhibit rehabilitation:

"The child who feels that he has been dealt with fairly and not merely expediently or as speedily as possible will be a better prospect for rehabilitation. . . . Thus, a general societal attitude of acceptance of the juvenile as a person entitled to the same protection as an adult may be the true beginning of the rehabilitative process."²⁴⁰

of their rights in a court of law." *McKeiver v. Pennsylvania*, 403 U.S. 528, 569 (1971) (Douglas, J., dissenting) (citation omitted).

235. To confirm this point, one need only spend a day observing the juvenile court. One scholar recommends that "[f]irst-hand observation of courthouse activities is essential" for a true understanding of the juvenile court system. BORTNER, *supra* note 18, at 18.

236. Ainsworth, *supra* note 23, at 1119-21.

237. Ainsworth concludes that "[a]s a consequence of this loss of legitimacy of the juvenile court, the process of legal socialization for a large segment of our youth has broken down." *Id.* at 1121. She defines legal socialization as "the inculcation of a society's approved norms and values regarding the law," and concludes that this is a "primary mechanism of social control." *Id.*

238. *In re Gault*, 387 U.S. 1, 28 (1967) ("Under our Constitution, the condition of being a boy does not justify a kangaroo court.").

239. Act effective July 1, 1995, ch. 226, art. 3, sec. 34, § 260.195(3), 1995 Minn. Laws 1184.

240. *McKeiver v. Pennsylvania*, 403 U.S. 528, 562 (1971) (Douglas, J., dissenting) (citation omitted).

By making the courtroom even more informal through the absence of defense counsel, disrespect for the system will be reinforced.²⁴¹ This is an important policy matter that the legislature should consider when reexamining these statutory changes denying juvenile petty offenders the right to counsel.

Perhaps even more important, the Minnesota legislature should have a serious discussion as to the validity of maintaining a segregated court system for children. As societal notions of childhood are changing,²⁴² it is time to reexamine our concept of children and the necessity for differential treatment between children and adults.

Preferably, these policy discussions should take place not only in committee hearings, but in public forums. The legislature has had to formally implement a triage system in the juvenile court system.²⁴³ The more serious cases are being sent to adult court, and, under these statutory amendments, the less serious cases are being tried without due process protection for the defendant.²⁴⁴ Only the children in the middle are receiving the procedural safeguards they deserve in the juvenile system. This is a serious policy decision, one about which the public should be informed.

III. A Call for Equality

At the very minimum, juvenile petty offenders should be granted the same right to counsel that adults possess. The child defendant's right should parallel the adult defendant's right and juvenile court judges should have the power to appoint counsel to indigent children in any case where legal representation would be beneficial. Further, the legislature should require that the court appoint a public defender any time a child requests an attorney.

Childhood is a social construct which has changed and evolved over time, with little basis in biology or reality.²⁴⁵ In other words,

241. Further, under the new statutory regime, if a juvenile fails to comply with a court order given for a petty offense, the court has little authority to respond. By statute, a juvenile cannot be found delinquent or be incarcerated solely for violating a court order given for a non-delinquent offense. MINN. STAT. § 260.301 (1994). Therefore, if the juvenile wishes not to comply with such a court order, the court has little authority to enforce its own sentence. This lack of authority exacerbates disrespect for the juvenile justice system.

242. For a thorough discussion of our changing conceptions of childhood, along with a compelling argument advocating the abolition of a separate juvenile court system, see Ainsworth, *supra* note 23.

243. Interview with John Stuart, *supra* note 80.

244. *Id.*

245. See Ainsworth, *supra* note 23, at 1085-1103 (discussing the evolution of the social construct of childhood); Prajna Das Gupta, *Images of Childhood and Theories of Development*, in THE FOUNDATIONS OF CHILD DEVELOPMENT 1, 6-12 (John Oates

if children are less competent and less capable than adults, it is because society has constructed them that way, and not due to any inherent incompetency.²⁴⁶ Even a social construct by itself can be a powerful motivator, molding children's behavior.²⁴⁷ If one treats a child as inferior and incapable, that child will usually respond accordingly. If, on the other hand, one treats a child as a competent human being, that child will usually act as a competent human being.²⁴⁸ The way in which society views children ultimately determines how the court system treats children.²⁴⁹

ed., 1994) (chronicling briefly the changing historical images of childhood); William Kessen, *Appendix: The American Child and Other Cultural Inventions*, in *THE CHILD AND OTHER CULTURAL INVENTIONS* 261, 262 (Frank S. Kessel et al. eds., 1981) ("[T]he child is essentially and eternally a cultural invention.").

246. See Ainsworth, *supra* note 23, at 1091 (concluding that "[s]ocial definitions of reality" determine our treatment of biological attributes); Kessen, *supra* note 245, at 262 ("[C]hildren [are] shaped and marked by the larger cultural forces.") (emphasis omitted).

247. One scholar explains:

Mother knows what a two-year-old is like and father does and the grocery man and the laundryman and the teacher and the policeman. Wherever the child goes, he gets a clear and congruent image of what he is supposed to be like and, perhaps not surprisingly, he takes it on rather easily.

William Kessen, *The Child and Other Cultural Inventions*, in *THE CHILD AND OTHER CULTURAL INVENTIONS* 26, 35 (Frank S. Kessel et al. eds., 1981).

Social construction may affect even biological attributes. See ROSEMARIE TONG, *FEMINIST THOUGHT* 127-28 (1989) (explaining Alison Jaggar's theory that environmental forces can change biology). See also MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 174 (1990) (describing labeling theory and the implications of being labeled by society as different or marginal).

248. There are numerous examples of children proving their competence. For example, in 1993, the Minnesota Attorney General created the Youth Task Force on Juvenile Justice. MINNESOTA ATTORNEY GENERAL'S YOUTH TASK FORCE ON JUVENILE JUSTICE, REPORT 1 (1994). The Task Force consisted of nine high school students who travelled around the state to conduct public hearings with other high school students. *Id.* The Task Force came up with substantial recommendations for the state's juvenile courts. For example, they recommended that Minnesota create better intervention programs for young children, and that the legislature rewrite the juvenile laws in "plain English." *Id.* at 6. Further, the high school students throughout the state made compelling and thoughtful statements. One Rochester student wrote on the importance of relationships to prevention: "Programs alone are not the solution. They are an impersonal way to deal with a personal problem. . . . Relationships are the key to both prevention and intervention." *Id.* at 28. This type of competence is not out of the norm for children when treated respectfully.

Some scholars have criticized basing rights on capacity or competence altogether. See, e.g., MINOW, *supra* note 247, at 146-47 (criticizing rights analysis for ignoring differences as defined by society); Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983 (1993) (criticizing the use of capacity as a prerequisite to rights for children).

249. See, e.g., Ainsworth, *supra* note 23, at 1101 ("[T]he social construction of adolescence as a species of childhood powerfully informed the ideology and practice of the *parens patriae* juvenile court.").

Unfortunately, the idea that children are people is not popular.²⁵⁰ Many adults do believe that children are less competent and less capable. If this is true, then there is an even greater need for children to have legal protection when facing any charge before the court,²⁵¹ whether charged with a petty offense or a delinquent act.

Perhaps there is a middle ground between these two positions. Even if one accepts the proposition that children are incompetent, in general, once a child has committed an adult crime, one has to accept that the child is capable of committing an adult act. The question remains whether this child should face the same consequences that an adult would.²⁵² As a society, we have already decided that children who commit these acts should have to face the juvenile court, a system that is becoming increasingly more punitive.²⁵³ If we are going to force that child, a person capable of committing an adult act, to face such a punitive court system, the courts should afford that child the same rights as an adult.

While the legislature should remove the disparity that these statutory amendments created, it should retain the benefits granted to children by the statutes. The move toward decriminalization of petty offenses was a positive change. Many of these offenses truly are petty. One scholar has even referred to this type of juvenile behavior as nothing more than "noise making, apple swiping, and window breaking."²⁵⁴ No one should be incarcerated for such petty actions. Even if the legislature were to repeal *in toto* the statutory changes made to children's right to counsel in 1995, the reduced sentences available should remain. Indeed, if the legislature resurrects the old sentencing options, it must guarantee that an attorney is available for every case, as Minnesota law requires the right to counsel any time the statute authorizes incarceration.

250. Hopefully, new psychological studies will change society's view of children. These studies are showing that the "binary opposition between child and adult" is breaking down, and perhaps soon the social construct of childhood will change again. Ainsworth, *supra* note 23, at 1103. This breakdown can be seen in the increasing presence of automatic waiver statutes in juvenile court proceedings. *Id.* at 1112. These statutes provide that for certain named offenses a child will automatically be tried as an adult, thereby rejecting the view of "child" and "adult" as mutually exclusive." *Id.*

251. For a similar argument, see *In re Brown*, 439 F.2d 47, 52 (3d Cir. 1971) (granting children the right to appeal because they need more protection).

252. This question has been with American law for some time, starting even before the creation of a segregated court system. In nineteenth century America, judicial sentences gave special allowances to children for their youthfulness. PLATT, *supra* note 15, at 101.

253. See *supra* note 170-73 and accompanying text (explaining the growing punitive purposes of juvenile courts).

254. ROTHMAN, *supra* note 17, at 250.

tion.²⁵⁵ Further, if resources are too limited to provide counsel to all children, then resources are too limited to pay for the incarceration of these youth.

Conclusion

In 1994, the Minnesota legislature responded to the absence of legal representation for children by enacting progressive legislation granting children not only the right to counsel but a guarantee that they would actually see an attorney before they went to court. While this legislation was overwhelmingly accepted, Governor Carlson vetoed the additional funding that the public defender offices needed to meet the new requirements of legal representation for children. In response, the 1995 Minnesota legislature amended a group of statutes, thereby creating the juvenile petty offender category and denying counsel to all children charged with one of these offenses. This created a different standard for children than that which is required for adults.

Under equal protection and due process analyses, this differential treatment will fail. Juvenile judges must at least have the discretion to appoint counsel for children in every case when the child requests an attorney or where the judge determines that the accused should have legal representation. This is the same right granted to Minnesota adult misdemeanants. In addition, the legislature should retain the reduced sentences for juvenile petty offenders. If children are going to accept the mandates of our legal system as just, they need to experience the system as one that treats them as equal people under the law.

255. MINN. R. CRIM. P. 5.02. Of course, a child defendant would still be able to waive this right. *See supra* notes 63-64 and accompanying text (describing the problems with waiver in juvenile court).

Alternatively, Minnesota could revert to the minimum requirements of *Scott v. Illinois*, 440 U.S. 367, 368 (1979). This approach, however, would be a significant step backward for Minnesota, and should be rejected. *See supra* note 51 and accompanying text (discussing the *Scott* standard and its numerous problems).